

United States ⁶
Circuit Court of Appeals
For the Ninth Circuit.

W. J. BOLAND,

Plaintiff in Error,

vs.

J. E. BALLAINE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Western District of Washington,
Northern Division.

FILED
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F. D. MONCKTON,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

Messrs. BRONSON, ROBINSON & JONES, Attorneys for Plaintiff in Error,

614 Colman Building, Seattle, Washington.

CARROLL B. GRAVES, Esq., Attorney for Defendant in Error,

607 Central Building, Seattle, Washington.

Messrs. LYONS & ORTON, Attorneys for Defendant in Error,

920 Alaska Building, Seattle, Washington.

[1*]

*In the United States District Court of the Western
District of Washington, Northern Division.*

No. 3122.

JOHN E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEMMETT,

Defendants.

**Stipulation Re Filing of Amended and Supplemental
Complaint, etc.**

Whereas, upon the coming on of this cause for trial on the 17th day of September, 1918, the plaintiff asked leave of the Court to file an amended and supplemental complaint, which leave was granted, and thereupon leave was granted the defendant, W.

*Page-number appearing at foot of page of original certified Transcript of Record.

J. Boland, to file an answer to said amended and supplemental complaint, and further leave was granted to the plaintiff to file a Reply to such Answer; and,

Whereas, the defendant Boland agreed to waive the effect of the fact that this present action was instituted prior to the termination of the action in the District Court in Alaska entitled the Alaska Northern Railway Company vs. John E. Ballaine and Frank L. Ballaine;

NOW, THEREFORE, it is stipulated between the plaintiff, John E. Ballaine and the defendant, W. J. Boland, that the Answer heretofore filed by the defendant, W. J. Boland, to the complaint of the plaintiff herein shall stand as the Answer of said defendant Boland to the amended and supplemental complaint filed under leave of the Court as aforesaid, with the proviso that the defendant, W. J. Boland, expressly waives the effect of the fact that this present action was instituted prior to the termination of the action brought by the Alaska Northern Railway Company vs. John E. Ballaine and Frank L. Ballaine in the District Court of the Territory of Alaska, Third [2] Judicial District, which suit is referred to in paragraph twelve of the amended and supplemental complaint herein.

And it is further stipulated that paragraph six of the plaintiff's amended and supplemental complaint shall be denied in so far as the allegation that all of the assets of the Alaska Northern Railway Company were sold to the Government of the United States should be deemed to include whatever rights the

Alaska Northern Railway had, or claimed to have, in the lands claimed by the plaintiff herein in the Seward Townsite to belong to John E. Ballaine.

It is further stipulated that all of the allegations of the Answer to the amended and supplemental complaint shall be deemed to be denied by the plaintiff herein, without the filing of any other, or formal Reply thereto, and that the case shall be tried upon the pleadings as amended and as covered by this Stipulation.

Dated at Seattle, Washington, Sept. 17th, 1918.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant Boland.

[Indorsed]: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 26, 1918. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [3]

*In the United States District Court of the Western
District of Washington, Northern Division.*

No. 3122.

JOHN E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEM-
METT,

Defendants.

Amended and Supplemental Complaint.

Comes now the plaintiff, leave of Court being first had and obtained, and files his amended and supplemental complaint, and for cause of action alleges:

I.

That heretofore the Alaska Central Railway Company, a corporation, was organized and existing under and by virtue of the laws of the State of Washington.

II.

That said railroad corporation was so organized for purposes of constructing a line of railroad from Ressurrection Bay in the Territory of Alaska to the interior of said Territory, and that said corporation did construct about seventy miles of said road, to wit: From said Ressurrection Bay to Kern Creek on Turnagain Arm, Cook Inlet, Alaska.

III.

That thereafter and during the year 1909, the said Alaska Central Railroad Company defaulted in its obligations and an action was commenced in the District Court of the Third Judicial Division of the Territory of Alaska entitled Trusts and Guarantee [4] Company, Ltd., vs. Alaska Central Railroad Company and others, and such proceedings were had in said action that a receiver was appointed and pursuant to a judgment and decree in said court and cause, all the property rights and franchises of said Alaska Central Railway Company were sold to F. C. Jemmett, Trustee, for the Sovereign Bank of Canada and other bondholders.

IV.

That thereafter and pursuant to previous contract the Alaska Northern Railway Company was incorporated under the laws of the State of Washington, the purpose for which said Alaska Northern Railway Company was organized was to take over the assets formerly owned by the said Alaska Central Railway Company and said assets were by said F. C. Jemmett, Trustee, turned over, transferred and assigned to the Alaska Northern Railway Company.

V.

That none of the stocks and bonds of said Alaska Northern Railway Company were ever sold on the market or at all, except as hereafter mentioned but were turned over to the above-named defendants, as a committee representing several banks in the Dominion of Canada, who claimed to be the owners of the stock and bonds of the said Alaska Central Railway Company.

VI.

That said above-named defendants acting for themselves and others unknown to this plaintiff sold all the assets of said Alaska Northern Railway Company to the Government of the United States by delivering and assigning all the stock and bonds of the said Alaska Northern Railway Company to the Government of the United States, reserving from said sale a tract of land near the Townsite of Seward, Alaska, consisting of about three hundred twenty (320) acres and known as the Poland Homestead, the exact [5] description of the said Polant Homestead is unknown to this plaintiff.

VII.

That the Ocean Terminus of said Alaska Northern Railway Company, formerly the Alaska Central Railway Company, is the Town of Seward, Alaska, situated at the head of Resurrection Bay, Territory of Alaska.

VIII.

That this plaintiff and Frank L. Ballaine were the owners of the tract of land on which the town of Seward is located and except the streets and alleys which were dedicated to the public, and lots which have heretofore been sold by this plaintiff and said Frank L. Ballaine, that the remaining lots owned by this plaintiff in the said town of Seward is of the value of two million dollars.

IX.

That on or about the 10th day of April, 1915, the defendants herein entered into an agreement with the Honorable Franklin K. Lane, Secretary of the Interior of the United States, and Lane acting for and on behalf of the President of the United States, as authorized by law, for the sale and purchase of that certain line of railroad extending from Seward, Alaska, to about Mile 73, northerly from said town of Seward; and the President of the United States, by virtue of his authority in that behalf, designated said town of Seward as the Ocean Terminus of a system of railways to be constructed in the Territory of Alaska, pursuant to an act of the Congress of the United States.

X.

That the designation of said town of Seward as

such Ocean Terminus of such railroad system created an active demand for lots in said town of Seward, Alaska, and greatly enhanced the [6] value of such lots, and that this plaintiff had entered into numerous agreements and contracts for the sale of lots in said townsite, and had received many inquiries and offers for lots in said Seward Townsite since said town was selected as such terminus.

XI.

That said defendants and others claim to own near and adjacent to the town of Seward, several hundred acres of land known as the Polant Tract and for the purpose of injuring this plaintiff and preventing this plaintiff from taking advantage of said demand and advance prices, and to place a cloud on the title to the property of plaintiff in said town of Seward, and prevent this plaintiff from selling this said property, and thereby enable said defendants to dispose of said land in said vicinity and thus change the center of population in said town of Seward and divert the trend of development and growth of said town of Seward to over and upon the land of said defendants, and to prevent the competition from this plaintiff, said defendants entered into said conspiracy to place a cloud on plaintiff's title to said property, and, in furtherance of said conspiracy, said defendants caused said action to be commenced, also caused to be filed in the precinct where said property of plaintiff is situated, notice of *lis pendens*.

XII.

That said defendants and others unknown to plaintiff as owners of said Polant Tract and with intent to

prevent plaintiff from taking advantage of said demand and selling said lots owned by this plaintiff and to sell lots from said Polant Tract and divert the growth and development of said town of Seward to over and upon said Poland Tract, conspired and confederated together [7] and with intent as aforesaid and to injure plaintiff and prevent plaintiff from selling his said lots and in furtherance of said conspiracy said defendants in the name of said Alaska Northern Railway Company, without probable cause and maliciously, commenced a false, fictitious and malicious suit against this plaintiff in the District Court of the Territory of Alaska, Third Judicial Division, and falsely and maliciously alleging in said suit that said Alaska Northern Railway Company was the owner of all the property of this plaintiff in said Seward Townsite, and filed a notice of *lis pendens* in said precinct where said Seward Townsite is situated, which said suit and *lis pendens* placed a cloud on plaintiff's title and prevented this plaintiff from selling his said property and taking advantage of the demand for lots in said Town of Seward caused by the Ocean Terminus of the said system of railroads under construction by the Government of the United States, as aforesaid.

XIII.

That such proceedings were had in said cause, that this defendant answered the complaint in the suit aforesaid, and issues were duly joined in said cause, trial was had, and, on the 9th day of November, 1915, the Court aforesaid made and entered, in writing, its Findings of Fact together with its Conclusions of

Law, and its final judgment whereby it was found and adjudged that the plaintiff was not entitled to relief and that the complaint of the plaintiff be and the same was dismissed, and that the defendants recover of and from the plaintiff their costs and disbursements incurred in said suit, and said prosecution was thereby fully terminated and said judgment remains in full force and effect. [8]

XIV.

That by reason of the commencement of said action and filing of said *lis pendens* many parties who had options to purchase lots from this plaintiff refused to carry out said options and pay the purchase price of said lots, and many others intending to buy from this plaintiff abandoned said intention and refused to buy said lots solely on account of said action, to plaintiff's damages in the sum of \$500,000.00.

XV.

That at the time of the commencement of said action by said defendants this plaintiff notified said defendants of the loss and damages this plaintiff would sustain by reason of said action, and filing said *lis pendens*, and repeatedly offered to show conclusive record evidence that said action was groundless, without merit, and the allegations of said complaint were false, and said defendants ignored such statements and refused to dismiss said action.

XVI.

That by reason of said wrongful, unlawful, malicious and fraudulent acts aforeaid, this plaintiff has been damaged in the sum of \$500,000.00, no part of which has been paid.

WHEREFORE, plaintiff prays the Court for judgment against said defendants, and each of them.

I.

For the sum of Five Hundred Thousand Dollars (\$500,000.00).

For the costs and disbursements incurred herein.

CARROLL B. GRAVES,
LYONS & ORTON,
Attorneys for Plaintiff. [9]

State of Washington,
County of King,—ss.

John E. Ballaine, being first duly sworn on oath, states: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

JOHN E. BALLAINE.

Subscribed and sworn to before me this 17th day of September, 1918.

ELIZABETH McKERSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Complaint. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 18, 1918. F. M. Harshberger, Clerk. By _____, Deputy. [10]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND et al.,

Defendants.

Answer of W. J. Boland.

Comes now the defendant, W. J. Boland, and answering the complaint of the plaintiff in the above-entitled cause, admits, denies and alleges as follows:

I.

This defendant denies each and every allegation, matter and thing contained and set up in paragraph VIII of plaintiff's complaint herein, and particularly denies that the value of the property described in said paragraph is of the value of Two Million Dollars, and as this defendant is not sufficiently informed as to the exact value of said land he denies that it is of any value in excess of One Hundred Thousand Dollars.

II.

This defendant denies each and every allegation, matter and thing set forth in paragraph X of plaintiff's complaint, and this defendant has no knowledge as to any agreement, or contract which the plaintiff may have made as therein described, and therefore denies that any such agreements were made, or

that any inquiries or offers were received by said plaintiff as in said paragraph set forth.

III.

Referring to the allegations contained in paragraph XI this defendant is not informed as to what parcels of land other people may claim to own near and adjacent to the town of Seward, but this defendant denies that or the purpose of injuring the [11] plaintiff or preventing the plaintiff from taking advantage of any demand and advances in prices, or to place a cloud upon the property of the plaintiff, or to prevent the plaintiff from selling his land and property, or to enable the defendant to dispose of said land and thus change the center of population, and to divert the trend of the development and growth of the town of Seward to, over or upon the land of the defendants, or to prevent competition from the plaintiff, or for any other reason or purpose whatsoever, or at all, the defendants entered into a conspiracy to place a cloud upon the plaintiff's title; and this defendant further says that any action which was commenced, or filed, or any *lis pendens* which was filed in the precinct where the property described by the plaintiff is situate, was filed in good faith, and in performance of what this defendant deemed to be his duty to divers and sundry persons, for whom he acted in a fiduciary capacity; and that such action was brought in the firm belief that the same was not only justified in point of fact and in the law, but said belief was founded upon the advice of competent counsel learned in the law, to whom the facts as known and understood by the defendant herein, were

fully imparted, and upon whose advice said action was brought; that the defendant then believed, and still believes, that said action was meritorious and well founded, and that the same will be prosecuted vigorously to a final conclusion.

IV.

Referring to the allegations contained in paragraph XII this defendant denies that he with any other person, or persons, whomsoever, with intent to prevent the plaintiff from taking advantage of any demand for the sale of his property and selling his property, or for the purpose of selling lots from any [12] property owned by this defendant, or to divert the growth and development of the town of Seward over upon any other property, conspired, or confederated, with such intent as aforesaid, or at all, or to injure the plaintiff, or to prevent the plaintiff from selling his lots, or in furtherance of any conspiracy whatsoever, commenced a false or malicious or fictitious suit against the plaintiff in any court in any jurisdiction whatsoever, and particularly in the District Court of the Territory of Alaska, Third Judicial Division; and further denies that the defendant confederated with anybody else and falsely or maliciously alleged in said suit that the Alaska Northern Railway was the owner of all of the property described by the plaintiff as his own; and this defendant further says that any allegations which were made in said suit were made in the utmost good faith, and were then believed by this defendant, and are now believed by him to have been in truth and in fact correct and true; that this defendant further

denies that said suit and *lis pendens* placed a cloud on the plaintiff's title or prevented this plaintiff from selling his property or taking advantage of the demand for lots in said town of Seward.

V.

Referring to the allegations contained in Paragraph XIII this defendant denies each and every allegations matter and thing therein contained, and particularly denies that said action was not commenced under any honest claim of right, or that it was commenced without a view or hope of sustaining the allegations of the complaint, or that it was commenced in furtherance of any conspiracy whatsoever, or with an intent to cheat or wrong or defraud or injure the plaintiff herein by placing a cloud on the title of said town site, or for any malicious or wrongful purpose whatsoever. [13]

VI.

Referring to the allegations contained in paragraph XIV this defendant denies any knowledge of the matters or things set forth therein, and further on information and belief denies each and every allegation, matter and things therein contained; and denies that the plaintiff has been damaged in the sum of Five Hundred Thousand Dollars, or in any sum of money whatsoever by the action of the defendant, or anyone else, or at all.

VII.

Referring to the allegations contained in paragraph XV this defendant denies that the plaintiff notified the defendant of the loss and damage the plaintiff would sustain by reason of the commence-

ment of said action, and further denies that the plaintiff offered to show conclusive record evidence that said action was groundless or without merit and that the allegations of said complaint were false; and the defendant further alleges that the plaintiff could not have shown by record evidence that said action was groundless and without merit, and that the allegations of the complaint were false in any event.

VIII.

Referring to the allegations contained in paragraph XVI this defendant denies the performance of any wrongful, unlawful or fraudulent acts, and denies that the plaintiff has been damaged in the sum of Five Hundred Thousand Dollars, or in any sum of money whatsoever.

WHEREFORE, the defendant prays that the plaintiff take nothing hereby, and that this defendant be dismissed without day and recover his costs herein.

BRONSON, ROBINSON & JONES,

Attorney for W. J. Boland. [14]

State of Washington,
County of King,—ss.

Ira Bronson, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, W. J. Boland, in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification for and on behalf of said defendant for the reason that said defendant is

without the jurisdiction of this Honorable Court and the State of Washington.

Subscribed and sworn to before me this 24th day of May, 1916.

[Seal]

Notary Public in and for the State of Washington, residing at Seattle.

Dominion of Canada,
Province of Ontario,—ss.

W. J. Boland, being first duly sworn, on oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

W. J. BOLAND.

Subscribed and sworn to before me this 30th day of May, 1916.

A. C. MACDONNELL.

A Notary Public in and for the Province of Ontario.

Due service of a copy hereof admitted this 6th day of June, 1916.

SMITH, NEWCOMB & WORTHINGTON,

Attys. for Pltff.

[Indorsed]: Answer of W. J. Boland. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 25, 1916. Frank L. Crosby, Clerk. By _____, Deputy. [15]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT, F. C. JEM-
METT,

Defendants.

Judgment.

Heretofore, on the seventeenth day of September, 1918, this action by the plaintiff against the defendant, W. J. Boland, came on regularly for trial, the other two defendants not having appeared herein either in person or by council.

The plaintiff, J. E. Ballaine, appeared in person and by his attorneys, Carroll B. Graves and Thomas R. Lyons. And the defendant, W. J. Boland, appeared in person and by his attorneys, Messrs. Bronson, Robinson & Jones. Witnesses on the part of the plaintiff and defendant, W. J. Boland, were sworn and testified in said cause.

After hearing all of the evidence, the argument of counsel for plaintiff and defendant, W. J. Boland, and instructions of the Court, the jury retired to consider their verdict and subsequently on the nineteenth day of September, 1918, returned into the court and being called, answered to their names and

say they find a verdict for the plaintiff, which verdict is as follows: [16]

*“In the District Court of the United States for the
Western District of Washington.*

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEMMETT,

Defendants.

We, the jury in the above-entitled cause, find for the plaintiff and against W. J. Boland, one of the defendants, and assess plaintiff's damages in the sum of (\$30,000.00) Thirty Thousand.

W. L. COOPER,
Foreman.”

Which verdict was received and ordered by the Court to be filed by the clerk in said court in this cause and said verdict was thereafter filed in said court and cause on said nineteenth day of September, 1918.

That immediately upon the announcement of said verdict by the clerk of said court, counsel for the defendant W. J. Boland, in open court, moved the Court for judgment in favor of said defendant W. J. Boland, notwithstanding said verdict, and thereafter, and on the 20th day of September, 1918, said defendant, W. J. Boland, filed in this court and cause a motion for judgment in favor of said W. J. Boland,

notwithstanding said verdict, and also a motion for a new trial herein, and the Court having heard argument of counsel for and against both of said motions, and the Court being now fully advised in the premises, denies and overrules each and both of said motions, and said verdict of said jury having been duly considered by the Court, to the overruling and denying of which motions the defendant Boland except which is allowed:

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED, by reason of the premises and of said verdict, that plaintiff do have and [17] recover of and from the defendant, W. J. Boland, the sum of Thirty Thousand Dollars (\$30,000.00), together with interest thereon at the rate of 6% per annum from and after the 19th day of September, 1918, together with plaintiff's costs and disbursements incurred in this cause, taxed in the sum of \$——.

Done in open court, this 27th day of November, 1918.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Judgment. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 27, 1918. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[18]

[Title of Court and Cause.]

Petition for New Trial.

To the Honorable Judges of the Above-entitled Court:

Comes now W. J. Boland, defendant in the above-entitled action, and now herewith, within forty-two days of the entry of judgment therein, that is, within forty-two days of November 27, 1918, respectfully petitions the Court to grant a new trial of the cause on account of the grounds and reasons hereinafter set out. This petition is based upon the pleadings, stipulations, depositions and exhibits on file and upon the stenographer's report of the proceedings at the trial, a copy of which is herewith filed and which will hereinafter be referred as the transcript. The reasons and grounds upon which this petition is based are as follows:

I.

ERRORS IN LAW OCCURRING AT THE TRIAL.

1. Errors in admission of evidence, rejection of evidence, and in refusal to strike certain testimony.

(a) The Court erred to the prejudice of the defendant in allowing the plaintiff to introduce evidence tending to show that after the suit complained of was begun, matters and things came to, or were brought to, the knowledge of the defendant which should have induced him to dismiss it. This was allowed to such a degree that the issue became "Had the defendant probable cause for keeping the suit pending?" [19] rather than, "Had he probable

cause for instituting it?" The evidence complained of will be found beginning just above the middle of page 79 of the Transcript and extending to below the middle of page 81.

(b) The Court erred in that after permitting the plaintiff to give the evidence complained of raising the issue, "Had the defendant probable cause for keeping the suit pending?" in admitting all the evidence of the plaintiff on that issue while excluding the evidence of the defendant, that is, in permitting the plaintiff to introduce evidence tending to show that the defendant acted in bad faith in not dismissing the original suit on account of knowledge which came to him after its institution, and at the same time excluding evidence offered by the defendant, to the contrary and tending to show that facts came to him after the institution of the suit which indicated that it was meritorious.

For example: On this issue the plaintiff Ballaine was allowed to testify that the defendant Boland heard Keeler give a deposition after the institution of the original suit which should have convinced the defendant that the suit was not meritorious (Transcript 79-81), while the defendant was not allowed to rebut this, and was by general ruling of the Court prevented from showing any facts apparently justifying the suit coming to his knowledge after its institution. Thus he was not allowed to testify as to what Keeler told him in explanation as to why he so deposed said explanation being made on the very day the deposition was given (Transcript, page 120). An exception was noted.

The plaintiff Ballaine was also permitted to testify that the defendant Boland was present when the bank books were examined and depositions taken tending to show that the \$4,000.00 paid for the land in dispute was ultimately paid [20] by Ballaine and not out of railway funds, and that even then defendant would not, and did not dismiss the suit. (Transcript 80-81.) Yet the defendant Boland was by the ruling of the Court cut off from explaining that on the same day that these depositions were taken Ballaine admitted, that he as an officer of the Railway Company had, at one time, issued a prospectus which stated to prospective bond buyers that the townsite of Seward belonged to the Railway Company. This ruling was made on the ground that the admission was made after the institution of the suit (Transcript 116). Exception was allowed the defendant.

(c) The Court erred in ruling upon evidence as to damages. This suit is strictly and wholly analogous to the action known as Slander of Title in so far as the only damages alleged flow from the alleged false claim throwing doubts on plaintiff's title. It is the universal rule that in such actions that damage can only be recovered for actual sales prevented and so stringent is the rule that the complaint is demurrable unless the parties to whom the sales could have been but for the doubt cast on the title, are specifically named therein.

The Court therefore erred in admitting Ballaine's loose testimony as to sales prevented. In fact he had no contracts binding anyone to purchase lots

(See Transcript page 96 and particularly Ballaine's statement thereon, "They were all options"). Furthermore these optionees were not named except the Fisher Flouring Mills (Transcript pages 73, 74), and J. H. Sears, who had an option on ten lots for a stamp-mill (Transcript 74). Ballaine had also negotiated with Mr. Fowler, wholesale grocer at Everett for the sale of twenty lots [21] (Transcript 74). Mr. Ballaine attempted to leave the impression that these options and negotiations would have ripened into sales but for the Boland suit, yet he admits, that the Fisher Mills decided to establish their business at Anchorage (Transcript 97), that Sears never did carry out his project of establishing a stamp-mill (Transcript 97), and that Fowler decided that Anchorage was the proper location for his wholesale grocery business (Transcript 98).

Instead of confining the witness to sales prevented the Court erred in permitting Ballaine to testify that he owned 600 lots and over defendants strenuous objection to testify that their sale price was depreciated fifty per cent (Transcript 70-71). There is no evidence that he could have sold a single one of them at the price he put upon them except "probably twenty" to C. B. Dodge. There is evidence only that a number of concerns hearing that Seward was to become the terminus of the Government railroad had an idea that it might become a great Alaska business center. They were not convinced that the lots were of the value Ballaine put upon them, but were willing to put up a small sum on options while they watched developments. The only ones named finally

chose other towns in Alaska in which to establish their business. There is nothing in the whole of Ballaine's testimony approaching or even approximating that certainty of proof required by the law in such a case as this. We have stated this matter at some length because the Court at several times during the trial expressed doubt as to plaintiff's theory of damage, finally indicating that he would allow this class of evidence to go in, stating that if any mistake were made, it would be rectified in considering a motion for a new trial. (Transcript 43.)

[22]

(d) The Court erred in allowing the plaintiff Ballaine to testify that he had incurred the enmity of Patrick by testifying before a Senate Committee and that Patrick threatened to retaliate (Transcript 86). This was allowed on the theory as plaintiff's counsel stated that it led to the question of defendant's malice (Transcript 83). There was not a scintilla of evidence offered that Boland ever knew or heard of this alleged threat. This testimony, particularly in the absence of any other evidence indicating malice was highly prejudicial.

(e) The Court again erred in refusing to strike the testimony concerning Patrick's threat after the plaintiff had failed to show that Boland had any connection with it or ever knew of it. Defendant's motion and the Court's ruling may be found on page 107 of the Transcript.

2. The Court erred at law in refusing to grant the defendant's motion for a directed verdict at the close of all the evidence. (Transcript 129.) The

reasons given in support of the following ground are herein incorporated.

II.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

1. Insufficiency of the evidence as to want of probable cause.

There was no evidence indicating want of probable cause for the institution of the original suit unless the fact that it was shown that Jas. A. Haight, who represented Ballaine as attorney in the suit, believed that it was not meritorious and so told Boland before he began it, was such evidence. The fact that Boland lost the suit is not persuasive evidence on this point, nor are the strictures of the trial court in the Findings and Conclusions which ought never to have been admitted. Probable cause for the institution of an action cannot be judged by what evidence the plaintiff [23] is able to produce at a trial, but by what evidence he believes he can produce before instituting the action. Testimony may be lost or witnesses may change their stories as was done in this case. (Transcript 124.)

There was, it must be admitted, some evidence that Boland did not have probable cause for keeping the action pending. In fact, this was made the main issue of the case, but since Boland was wholly debarred from contesting that issue by the rulings of the Court, that evidence ought not to be considered.

But even if plaintiff had produced strong evidence of want of probable cause in his main case, something more was necessary. The defendant having alleged and proved by way of defense, that he

brought the action upon the advice of a great number of attorneys after in good faith disclosing to them the facts, it became necessary for the plaintiff to deny this and to support his denial with affirmative evidence. Where, in a suit of this kind, that defense is pleaded and supported by evidence no amount of evidence tending to establish want of probable cause will be sufficient to establish that want, or take the case to the jury, unless it be of a character that will tend to disprove that specific defense. The plaintiff offered no evidence whatever in support of its reply. In fact, he did not even put in a reply until after both sides had closed. (Transcript 127.)

2. Insufficiency of the evidence to establish malice.

There was no direct evidence of malice nor any from which malice could be reasonably inferred. It could not reasonably be inferred from the testimony that Patrick had threatened to retaliate on Ballaine on account of Ballaine's testimony before the Senate Committee, although there is but little doubt in defendant's mind that it was from this testimony that the jury made its inference. [24]

Nor could it, we submit, be inferred from the fact that some of Boland's associates owned a tract of land a mile or more from the business district of Seward. It will be noted that there is no evidence that Boland himself had any financial interest in this tract, and that three government tracts intervened between Ballaine's land and the tract, and it was therefore not in a location to compete with the Ballaine lands. (Transcript 100-106.)

3. Insufficiency of evidence to justify the verdict in respect to the amount awarded.

The verdict is for \$30,000.00. We submit that the only tangible evidence as to damages is contained in the testimony given by C. B. Dodge. Dodge testified that he bought twelve lots in 1916 for \$1,000.00 each, and that if they had not been incumbered by the suit they would have been worth from \$1,500.00 to \$1,800.00 in 1915. (Transcript 47.) When asked how many lots he would have bought in 1915 had the title not been clouded by the suit, he replied:

“I didn’t have a fixed definite number in my mind, but I would probably have bought in the vicinity of twenty or twenty-five lots.” (Transcript 50.)

Even if the probability be taken to be the fact and even if the outside estimate as to value be used, this evidence is very far from being sufficient to justify a verdict for \$30,000.00.

WHEREFORE, on the records and files herein-before mentioned and for the foregoing reasons, and each of them, the defendant prays the Court to grant a new trial of this cause.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant Petitioner.

Received copy of the foregoing petition on Jan. 6th, 1918.

LYONS & ORTON,
Attys. for Plaintiff. [25]

[Indorsed]: Petition for New Trial. Filed in the United States District Court, Western District of

Washington, Northern Division. Jan. 6, 1919.
 F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
 [26]

[Title of Court and Cause.]

Order Denying Petition for New Trial.

WHEREAS, the Court has duly considered the defendant's petition for a new trial of the above-entitled cause, which petition was filed in this court on January 6, 1919;

IT IS HEREBY ORDERED:

1. That said petition be, and it hereby is, denied.
2. That the defendant be allowed an exception to such denial as to each of the grounds urged in said petition.
3. That the defendants' time for filing a Bill of Exceptions in this cause be extended to thirty days from the date hereof.

Done in open court this 21st day of January, 1919.

EDWARD E. CUSHMAN,

Judge.

O. K.—LYONS & ORTON.

[Indorsed]: Order Denying Petition for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 22, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

[Title of Court and Cause.]

Defendant's Proposed Bill of Exceptions.

BE IT REMEMBERED, that heretofore and on, to wit, the seventeenth day of September, 1918, the above-entitled cause came regularly on for trial before the Honorable E. E. Cushman, Judge of the above-entitled court, plaintiff appearing in person and by his attorneys, Carrol B. Graves and Thomas R. Lyons, of Lyons & Orton, and defendant, W. J. Boland, appearing in person and by his attorney, Ira Bronson of Bronson, Robinson & Jones, and a jury having been duly empaneled and sworn, the following proceedings were had, to wit:

Counsel for plaintiff made an opening statement, stating among other things the following:

Mr. GRAVES.—This is an action nominally against three defendants but actually against W. J. Boland only, he being the only defendant served with process. It is an action to recover damages for the malicious prosecution of a civil action. We desire to make certain amendments. In the tenth line of paragraph XII of the complaint we desire to inter-line before the word “commenced” the words “and without probable cause and maliciously.”

The COURT.—“Amendment allowed.”

Mr. GRAVES.—At the end of paragraph XII we wish to add the following: [28]

“That such proceedings were had in said cause, that this plaintiff answered the complaint in the suit aforesaid and issues were duly joined in said cause, trial was had, and on the ninth day

of November, 1915, the Court aforesaid made and entered in writing, its Findings of Fact together with its Conclusions of Law, and its final Judgment, whereby it was found and adjudged that the plaintiff was not entitled to relief and that the complaint of the plaintiff be and the same was dismissed, and that the defendants receive of and from the plaintiff their costs and disbursements incurred in said suit, and said prosecution was thereby fully terminated and said judgment remains in full force and effect.”

This amendment was also allowed and said counsel offered in evidence Findings of Fact, Conclusions of Law and Judgment in Cause No. 720 in the District Court for the Territory of Alaska, Third Division, entitled Alaska Northern Railway Co., Plaintiff vs. The Alaska Central Railway Company, et al., and John E. Ballaine, et al., Defendants, which was admitted as Plaintiff’s Exhibit 1, and as such is hereto attached and made a part of this bill.

The plaintiff then offered oral testimony, each of the witnesses being duly sworn, and testifying in substance and effect as follows:

Testimony of James A. Haight, for Plaintiff.

That he was one of the attorneys for John E. Ballaine, in the Alaska Northern suit against said Ballaine and others, a portion of the record of which had just been introduced. He identified his unverified office copies of the complaint in that case, and the answer of Ballaine. These were offered in evidence as one exhibit, and over defendant’s objection,

(Testimony of James A. Haight.)

admitted and read to the jury. This exhibit was marked Plaintiff's Exhibit 2, and as such is hereto attached and made a part of this bill.

Counsel for plaintiff then introduced in evidence the *lis pendens* filed in the Alaska suit which appears in the record as Plaintiff's Exhibit 3, and as such is hereto attached and made a part of this bill.

Plaintiff then read in evidence his Exhibit 1 and then called the defendant Boland as a witness. [29]

Testimony of W. J. Boland, for Plaintiff.

That he was one of the defendants in the cause, by profession a barrister and solicitor, living in Toronto, Canada, and was one of a committee of three who instituted the Alaska Northern suit against Ballaine through T. C. West, an attorney practicing at San Francisco, California, who was born and educated at Toronto. That witness went to San Francisco to instruct Mr. West to bring the said suit in accordance with instructions he had received to bring the action, and gave West part of the facts upon which he drew the complaint. That he was not an officer of the Alaska Northern Ry. Co., but was one of a committee of three representing a syndicate of bondholders who owned all that was left of the Alaska Northern.

That he knew James A. Haight, a director of the Alaska Northern, and who acted as secretary of the company and as its attorney in legal matters arising in the vicinity of Seattle, and that Mr. Haight made a trip to Canada and that he discussed the Ballaine

(Testimony of W. J. Boland.)

matter with him. That he had previously had some correspondence with Mr. Haight about the matter and that Haight came to Toronto prior to Thanksgiving, 1914. That Mr. Haight did not tell him on that occasion that the records of the Company would show that John E. Ballaine paid the \$4,000.00 for the homestead. Witness was asked if he had not substantially so testified in the Alaska Northern suit. Witness replied, that he could not remember his testimony but he did remember that Mr. Haight told him in his office at Toronto that Ballaine had told him that he had repaid the money which Mr. Keeler had paid out.

Witness was asked whether or not Haight had told him that he Haight, had arranged with Mr. Frost to produce the books so that Keeler could go over them, and whether or not Haight had not told him that Mr. Keeler would state that the \$4,000.00 had [30] been paid by the Tanana Construction Company to Mrs. Lowell and that he Keeler, had afterward been paid back. Witness replied that they had talked about the \$4,000.00 but that the conversation was not that in substance and effect. He was asked if he had not testified in the Alaska Northern suit against Ballaine, that he had had such a conversation with Haight. He replied that he did not remember so testifying, and in being asked if he would deny that he did, said, "I won't because I don't remember."

Witness said that some of the books at the time of the conference with Haight were in the possession

(Testimony of W. J. Boland.)

of Judge Landis' Court at Chicago being impounded in the Alaska Coal cases, and that he told Mr. Haight to go and see Patrick, the syndicate's attorney in Washington, who had access to them, and if he could convince Mr. Patrick he was right, Patrick would so advise them; that Mr. Haight did go to Washington, saw Mr. Patrick, and did not convince him.

Witness was asked whether he remembered giving the following testimony in the Alaska Northern suit in reply to a question by Ballaine's attorney, Mr. Haight.

"A. No, sir; I don't recollect that. My recollection of the transaction was that your views were so strong and that you were so opposed to Mr. Patrick's views, that I said to you when you were in New Jersey, why not go to Washington and see if you could not convince Mr. Patrick that his views were wrong."

The witness replied that this must be correct because that was what happened at the Toronto interview and that Haight went to Washington to see Patrick at his suggestion.

The witness was also asked whether he had not testified in the Alaska Northern suit that in the interview with Haight at Toronto he had been impressed with the fact that here was one of the Alaska Northern's attorneys, Patrick, claiming that it owned the townsite of Seward, and that they should take action to recover [31] it and another, Haight just as strongly contending to the contrary and that he was trying to get them to thresh it out and let him out as

(Testimony of W. J. Boland.)

trustee, to which he replied that he did not remember saying it, but that it sounded about what he would say.

Witness testified that he did not understand from Haight that he had seen the books and Patrick had not because Colonel Swanitz always claimed that he had the original letter-book and produced the original letter-press, and showed witness letters written by Keeler to Ballaine after the \$4,000.00 payment was supposed to have been made. He also testified that he probably testified in the Alaska Northern suit that Haight suggested that they ought to get Keeler's statement.

“Q. Was this question asked and this answer given: ‘Q. Was there anything to prevent Mr. Keeler going to Washington and seeing Mr. Patrick and examining the books? A. I gathered the impression somewhere, I don't know where, but I had it, in my mind, that Mr. Keeler was an adverse witness so far as we were concerned. I had that impression all the way through. I did not know at that time that Mr. Keeler was a Shedd representative. I thought he was a Frost representative, and Mr. Frost and ourselves were fighting in the courts, and Mr. Frost would not do anything for us. We were fighting right along the line.’ “Is that your testimony”?” A. “It may have been; I don't remember.”

Cross-examination.

Mr. Haight had represented the Alaska Northern a long time but the witness did not consult him with

(Testimony of W. J. Boland.)

respect to the legal question involved but merely the facts. Mr. Haight informed the witness that he could not act for the company in such a suit because of his relations with Ballaine and subsequently while still in the employ of the company and after the suit had been instituted Haight wrote to witness that he had been offered a fee by Ballaine to [32] appear for him, and witness wrote Haight that he had no objection.

Mr. Swanitz was the chief engineer of the Alaska Northern and had been from the very commencement. He was also a trustee.

Mr. Keeler was the disbursing officer of the railroad who paid out money after the disbursement had been O. K.'d by Mr. Swanitz during what was known as the Shedd regime.

The witness was one of the three syndicate managers, and general counsel for the syndicate who represented the original bondholders of the Alaska Central Railroad who organized the syndicate and had the road foreclosed. They controlled the stock of the Alaska Northern.

Redirect Examination.

Haight came to Toronto representing Ballaine. The syndicate did not pay him.

Recross-examination.

Haight continued to represent the Alaska Northern after the Toronto visit but witness understood that he came to Toronto representing Ballaine. He

(Testimony of W. J. Boland.)

was not charging Mr. Haight with any improper action.

Redirect Examination.

Q. "What do you mean when say say, 'Here were two attorneys representing us' " ?

A. "Representing the Alaska Northern Railway. Mr. Haight was our attorney, our secretary out here, paid by us."

Testimony of James A. Haight, for Plaintiff.

He represented the Alaska Northern Railroad when he called in Boland in Toronto and not John E. Ballaine and if his statements were made as an attorney at all they were made as attorney for the Alaska Northern. Having been assured by counsel for defendant that there was no objection to his testifying about his conversation with Boland he testified as follows: [33]

A. "It is a little bit hard to tell just where to begin, but the whole matter of the relations of the Alaska Central Company to this townsite had been a matter of inquiry by Mr. Boland, who, so far as I was concerned, represented all who were interested in the Alaska Northern Railway Co. I had stated to him the facts that were within my knowledge; that is, for instance: This meeting of the Alaska Central Railway Co., at which the question of the Alaska Central Railway Company's relation to the townsite came up, and at which the directors, or trustees of the Alaska Central Railway Company practically took the position that the railway company was not

(Testimony of James A. Haight.)

interested in the townsite. I don't recall when the matter of this \$4,000.00 item paid by Mr. Keeler to Mrs. Lowell, and subsequently paid back by Mr. Ballaine to Mr. Keeler was brought to my attention. That transaction took place at Seward. I was the secretary and attorney of the Tanana Construction Company, of which Mr. Keeler was the treasurer. I was also secretary and attorney of the Alaska Central Railway Company; but I have no recollection of that item at the time. When that was called to my attention, I suggested that Mr. Keeler was a very important witness on that question. I have never heard that there was a resulting trust in favor of the Tanana Construction Company, or the Alaska Central Railway Company, and I felt that I was in a position to know of such a fact, and to learn of it if anybody was. I therefore suggested to Mr. Boland, either orally or in writing, that he see Mr. Keeler. I am quite confident that I mentioned that to him sometime when he was in Seattle, and suggested that he try and see Mr. Keeler when he passes through Chicago, because I understood that Mr. Keeler was then living at Chicago. That fall, that is the fall of 1914, I went east. Just before I went East I saw a gentleman by the name of Christensen, at the suggestion of Mr. Boland, who, there was a rumor that Mr. [34] Christensen was connected with the land department of the United States in Alaska, had said something to the effect that the Alaska Northern might have some interest in this property. And, as Mr. Boland said, I was attorney for the Alaska

(Testimony of James A. Haight.)

Northern in this vicinity, and in regard to their land holdings, their right of way. I suppose all their papers regarding the securing of the right of way through the land department, and a great many other matters regarding their land holdings were attended to by me. I went and saw Mr. Christensen, who happened to come down from Alaska just prior to my leaving for the east; and Mr. Christensen said that he had been misquoted. I, being impressed with the importance, from the Alaska Northern's point of view, and from the point of view of getting at the facts, of seeing Mr. Keeler, wrote to Mr. Frost. I was going to Chicago on my way east, and I wrote to Mr. Frost to arrange to have Mr. Keeler see me and he did. I think Mr. Keeler was living a little bit out of town. I have forgotten about that. But I saw Mr. Keeler, and he assured me that that \$4,000.00 had been paid back by Mr. Ballaine, and that, to my mind disposed of that phase of the case, and I told the result of my inquiry to Mr. Boland, and suggested the wisdom of seeing him, or having his records looked up, so that the whole thing could be absolutely verified, beyond any mistake as to what the facts were."

Cross-examination.

He had no personal knowledge of the \$4,000.00 entry. He was consulted about the Ballaine matter when it first came up, had had no relation with Ballaine for years and in fact had been adverse to him in many Alaska disputes. Witness was at the

(Testimony of James A. Haight.)

time getting \$100.00 a month from the Alaska Northern.

Mr. BOLAND.—“I want Mr. Haight to understand that Mr. Haight did not come there at our request. I did not intend to infer, or want anybody to think that I tried to infer that there [35] was anything improper in his coming there; but we did not ask him to come there; neither did we pay his expenses, and he gave me the impression that he came there representing Mr. Ballaine.”

“Mr. GRAVES.—If you are going to testify, I would rather have you get up there under oath.”

Redirect Examination.

Witness cross-examined Boland in the Alaska Northern suit at Seward and remembered that Boland testified to the effect that “Here were two attorneys representing us, both of them in our employ,” etc., referring to witness and Patrick. He investigated the story of the purchase of the land with company friends and inquired of Keeler who was supposed to have made the payment and told what he learned to Boland in October or November, 1914.

Recross-examination.

Witness was shown a letter written by him to Boland on October second, 1914, containing the statement “that payment of \$4,000.00 was made,” and expressing an uncertainty as to why it was made by the company—witness then testified as follows:

“A. Yes, sir; I did not know about that. I am

(Testimony of James A. Haight.)

quite sure I did not know about that until I saw Mr. Keeler.

Q. What did you find from Mr. Keeler?

A. I found from Mr. Keeler that he paid the money, the \$4,000 to Mrs. Lowell, and that—

Q. That he, the company, paid the money?

A. Well, of course, I suppose that the Tanana Construction Company. He was disposing of the funds. The point was whether the money had been paid back, and he said it had. Of course, I did not suppose Keeler was putting any of his individual money into it, because I did not think he took any money of his own up there.

Q. You didn't find anything to persuade you that the company did not originally advance the money?

A. Well, I was satisfied that the company did originally advance [36] some money. That would be my inference from what was said there.

Q. Did you go on to Washington to see Mr. Patrick?

A. Well, I went—Now, Mr. Boland is telling the story from his point of view, of course, I was not interested in Mr. Patrick, because what we wanted to do was to get at the facts. Mr. Patrick, of course, did not know anything about this transaction; but I was expecting—my special errand at Toronto, as well as seeking to clear this matter up, was to hurry up a payment to myself of about a thousand dollars that was due, and long overdue from the Alaska Northern, and I thought I might hasten that, and I think my visit did, because en route I did receive a

(Testimony of James A. Haight.)

portion of what was due me. Then, coming back, I came by way of Washington. I was visiting a friend in West Virginia, from which point I wrote a letter in regard to this matter, that Mr. Boland must have seen, and I was about a half a day with Mr. Patrick. Mr. Patrick, who had some, I have forgotten whether they were the Tanana Construction Company, or Tanana Railway Construction books, he had a book of either one of those, or both. I think he showed me two books in which there was this item of \$4,000, in both of them noted there; but the entry there was so vague that I could not make anything out about it, and I thought that it would be well for him to see Mr. Keeler, or vice versa, about that.

Q. Mr. Patrick's idea was that a resulting trust had arisen from the payment of that money by the Tanana Construction Company in favor of the company?

A. I am not sure that it was solely from that. Of course, I can't say now, but I had the impression that it was also due to Mr. Ballaine's relations as trustee, one of the trustees of the company. [37]

Q. One of the trustees of the company?

A. Probably. I am not not quite clear, but I do think that Mr. Patrick had that \$4,000 item; at least I had that distinctly in mind. He was very positive in his opinion that an action ought to be brought, wasn't he?

A. I don't know whether I discussed with him the bringing of any action. I would not say that, one way or the other.

(Testimony of James A. Haight.)

Q. You were impressed with his opinion that there was a right of action?

A. Mr. Patrick was a gentleman of very positive views on anything he did.

Q. He had a positive view that there was a right of action. You haven't answered the question.

A. I would say, "yes."

Q. You would say it?

A. Yes."

Redirect Examination.

Witness could not recollect whether or not he told Mr. Patrick that Keeler had told him that the money had been repaid. Mr. Keeler was representing the Shedd Interests and was acting Treasurer of the Tanana Construction Company—and would naturally have the books. But witness saw two large books in Mr. Patrick's possession, one of them the Alaska Construction book "and I had the impression that the other was the Tanana Construction Company."

Testimony of C. B. Dodge, for Plaintiff.

That he had resided in Seattle since 1901, and was a dealer in real estate and had been in that business since 1890. He arrived in Seward May 18, 1915, having gone there to speculate in real estate following the announcement of the government road. He tried to get at the value of every lot in Seward and made a complete abstract of the part south of Seward Creek, intending to buy close in [38] property.

He purchased two lots on Fifth Street and two

(Testimony of C. B. Dodge.)

on Fourth Street. He went to the Commissioner's office and read the *lis pendens* in the Alaska Northern suit against Ballaine. He was asked what effect the suit had on the value of the property described in the *lis pendens* whereupon the defendant objected on the ground that it was incompetent, irrelevant and immaterial and not the proper measure of damages. Whereupon the following discussion was had.

“Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not a proper measure of damages.

The COURT.—I will hear from you Mr. Lyons.

Mr. LYONS.—The purpose of this, if your Honor please, in the nature of things, the only way to show the damage that Mr. Ballaine has sustained is to show what effect this *lis pendens* had on his property, and what the value of other property in the same vicinity was selling for, and if it was impossible for him to sell it at that time, and if we can show later on, the prices. If we can show the prices that he could have sold it for at that time, and the prices that he could have sold it for later on, we can then show the damage that he sustained by reason of the filing of this suit.

The COURT.—Are you not going to be confined to special instances?

Mr. LYONS.—Well, if your Honor please, we can show special instances, if we are permitted to; but it seems to me that if we can show that there was a demand at that time for other lots in the same vicinity, and that Mr. Ballaine's lots could not be sold because

(Testimony of C. B. Dodge.)

his title was clouded, then the special instance that we can show will enable the jury to infer what were the losses from other lots that we can't specifically deal with.

The COURT.—That is, you expect to contrast, to use that as part of your evidence, the contract, between what lots were selling for [39] that were unaffected by the suit.

Mr. LYONS.—Yes, your Honor.

The COURT.—Either what he had to take, or what he could not get for the lots that were affected.

Mr. LYONS.—Yes, your Honor.

The COURT.—And coupled with that evidence those that were similarly situated?

Mr. LYONS.—Yes, if the Court please.

Mr. GRAVES.—Of course, it can't all be introduced in the same breath, but we expect to show that this deterioration of prices extends down to the present time. Of course, that makes the loss direct at the time of the bringing of the suit.

Mr. LYONS.—We expect to show also, if your Honor please, that the order of the President at that time making Seward the terminal gave an impetus, or gave value to property there that it may not have at this time, and may never have again, and the plaintiff at that time could, and would have disposed of his property, and that he can't dispose of his property for the same price now.

The COURT.—Are you sure that we are not left to speculate that he might not ultimately get more for it than he would at that time?

(Testimony of C. B. Dodge.)

Mr. LYONS.—It seems to me, if your Honor please, that in response to that, that is a matter of speculation as to what may develop in the evidence. If we can show that it had a certain value at that time, and that he was prevented from selling it by reason of the suit, and now when the suit is blotted out that he can't sell it for those prices, it seems to me we could not be expected to indulge in speculation as to what its value may be in the future.

The COURT.—I am aware of the fact that you are getting on dangerous ground, but to stop in the middle of a lawsuit and try to find the right line is hardly as satisfactory as to take plenty of [40] time on the matter. If there is any mistake made in the admission of this testimony it will have to be rectified on the consideration of a motion for new trial when it becomes necessary. The objection will be overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

The witness testified that he knew the effect that the filing of the *lis pendens* had on him and that he remained at Seward a little more than two months and that he eliminated the Ballaine property on account of the suit in making up his abstract. He purchased six lots of Colonel Blethen on Fourth St. though Mr. Ballaine had lots on the same street that he would have preferred had it not been for the suit; there were two or three worth \$3,000.00 apiece. “Q. Did you subsequently, at any time, make any

(Testimony of C. B. Dodge.)

other purchases of lots from Mr. Ballaine in the townsite? A. I did.

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, what he did purchase.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

Witness answered that in the fall of 1916 he purchased twelve lots.

“Q. What did you pay for those lots?

Mr. BRONSON.—I object to that as being incompetent, immaterial, and irrelevant.

Mr. LYONS.—I want to show, if your Honor please, what he paid for those lots, and what the value of the same lots were when the suit was first brought?

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception. [41]

The COURT.—Exception allowed.

A. I paid \$1,000.00 apiece, \$12,000.00 for the twelve lots.”

Witness testified that in 1915 those lots would have been worth from \$1,500.00 to \$1,800.00 each.

Mr. BRONSON.—We object to all of this as not a proper measure of damages, or the way to arrive at the result which the plaintiff has in mind, so as to save encumbering the record.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

(Testimony of C. B. Dodge.)

The witness was asked to state whether there was any demand for lots in May, 1915. The defendant objected that the answer would not be relevant on the measure of damages and said objection being overruled the witness answered that a dozen men went up on the same boat with him to buy lots. That about five-twelfths of the townsite was included in the suit, and a number of sales were made in the area not covered by it.

“Q. Can you state whether or not Mr. Ballaine could have disposed of any considerable number of lots at that time?

Mr. BRONSON.—I renew the objection, because it is necessary to make it definite in some form.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

Witness answered that he would have bought a great many more lots of Ballaine but for the suit; that some of his associates would have done the same thing and he heard others state that they would.

“Q. How many lots were you yourself prepared at that time to purchase from Mr. Ballaine, had his title not been clouded by that suit?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant. [42]

The COURT.—Objection overruled. Exception allowed.

A. I didn't have a fixed, definite number in my mind, but I would probably have bought in the vicinity of twenty or twenty-five lots.

(Testimony of C. B. Dodge.)

Mr. BRONSON.—I move to strike out the answer as not definite. The witness says he does not know. He is speculating on what he probably could have done.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Allowed.”

Witness further said that he went to Seward with the intention of purchasing a considerable number of lots. That Ballaine arrived there about May 25 or 26 and that he made it a fixed policy not to buy anything of Ballaine except such lots as were not clouded by the Alaska Northern suit.

Cross-examination.

That he did not pay cash for the lots bought of Ballaine. That he bought an improved lot for \$4,500 cash, and other unimproved for \$2,500 cash and two others for \$4,400. That he took up between eighteen and twenty thousand dollars to invest, and a letter to the bank authorizing him to use more.

Witness further said he did not know what proportion of the area unaffected by the suit was sold in 1915 but that there were a great many lots sold.

Testimony of J. E. Ballaine, in His Own Behalf.

The plaintiff testified that he was the principal defendant in the Alaska Northern suit, and that he had resided in Seattle about thirty-nine years. That the complaint in that case was wired to Alaska and he was first informed of it by seeing an account of it in the “Seattle Times” under great flaring headlines. The suit was filed April 29th, 1915, and witness ar-

(Testimony of J. E. Ballaine.)

rived in Seward the latter part [43] of the following May. That he was the founder of Seward, and the person most largely interested in the town-site, owning about six hundred lots.

Resurrection Bay is about six hundred miles west of Juneau, but in an air line about one hundred and seventy-five miles west of Cordova. It extends north into the land about twelve miles and Seward is situated at its northwestern corner and was designated by the President of the United States as the ocean terminus of the Government railway.

The witness was familiar with the demand for and value of lots in Seward at that time. The principal business street was Fourth Avenue, on which the witness owned approximately sixty-five lots. The witness was asked what the value of the lots would have been at that time if it had not been for the Alaska Northern suit. Objection was made and plaintiff's counsel stated his theory of damage as follows:

“Mr. GRAVES.—The method by which we will arrive at any depreciation of value, I was proposing to suggest by further question. But we can prove the character of that property, and the value of it at that time. It would be like arriving at the measure of damages regarding real estate at any other place. You can certainly get the value of it at a certain time for the purpose of contrasting the rise in price, or depreciation in price, causing the difference between the property which he had at that time. Of course, we must go further and show how much of

(Testimony of J. E. Ballaine.)

that was sold. I propose to show transactions and contracts for the sale of that property.”

The witness testified that he had had talks with prospective buyers before the suit was brought and was acquainted with the values of those lots.

“Q. What would you say was the value of those lots? [44]

Mr. BRONSON.—I renew my objection, if your Honor please.

The COURT.—It is a very doubtful question, but I will overrule the objection.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

The witness testified that he had offers of \$3,000 for lots in Block 15 facing Fourth Avenue, and for lots in block 16 practically the same price.

“Q. In those two blocks, how many lots did you have?

A. I think about twelve. In the block next north, or the tiers of blocks north of that, the lots held by other persons whose title was not affected by this suit sold at \$2,000.00; that is to say that the tier of lots—

Mr. BRONSON.—I object to that and move to strike out the question and answer. By the question it is impossible for me to anticipate the form in which he is going to answer those questions.

The COURT.—The motion is denied. Exception allowed.”

That in his opinion, lots in Block 23 were worth \$2,000 for inside lots and \$2,200 or possibly \$2,500

(Testimony of J. E. Ballaine.)

for corners; in block 24 across the street practically the same price; in the block north of that about \$1,500. That he had an offer of \$4,000 apiece for two lots adjoining the site bought by the city for the city building.

“Q. How many of those lots bore the value of \$2,000.00 that you owned?”

A. About twenty-six. I want you to understand that I am giving this from my best recollection. If I had known that you were going to ask these questions I could have had my books here, and given you the exact number, but that is not more than one or two from the exact.

Q. About how many lots, to the best of your recollection, had the value which you placed at \$1,500.00? [45]

A. About the same number, twenty-six. Then there was another tier of blocks still beyond that.

Q. What value?

A. A block there, the lots in that, had the value of about \$1,200.00.”

There was another tier of about sixty-five lots worth about \$1,200 each. That the values on Adams Street were about 25% less than on Fourth Street, and that he owned relatively the same number of lots on each. That he owned a few more lots on Third than on Fourth, and their value was about fifty per cent of the Fourth Avenue lots. The foregoing were on business streets.

“Q. What do you say as to the value of other lots in the townsite. Do you own other lots other than

(Testimony of J. E. Ballaine.)

those which you own on Fourth, and Third, and Adams? A. The values block by block—

Q. I would rather you would give it an estimate by the streets, if you could, or generally; that is, I think that you would come to the nonbusiness lots to a certain extent.

A. On First Avenue, extending from the bay up to Lowell Creek, or Jefferson Street, which is about half way through the town, the values were approximately about \$800.00 for inside lots, and \$900.00 to \$950.00 for corner lots. On First Avenue north of the— Well, I will say, first, south of Lowell Creek because Lowell Creek is the dividing line really which separates the present business district from the rest of the town. On second Avenue, the next east of First from the bay is Jefferson Street, which is about half the length of the town, the values were about a thousand dollars, and on Third about \$2,000.00. On Fourth, \$4,000.00; on Fourth, \$4,000.00 between Washington Street and Adams, which would be the first tier of lots next to the water front; about \$3,000.00 between Adams and Jefferson, except two lots adjoining the site of the city building. Then on Fifth [46] Avenue, the one directly east of Fourth, the values were about \$3,000.00 a lot. Some were purchased actually for \$3,000.00 a piece. On Sixth Avenue, about \$2,000.00. On Seventh and Eighth Avenues, about \$2,000.00 apiece up to Jefferson Street. Now there was a little variation in the values of those lots. I am giving the average.

(Testimony of J. E. Ballaine.)

Q. That is what I want.

A. Some lots, for instance, close to some important business house, close to the postoffice, or close to the railway headquarters building, had a little higher value by reason of their location than other lots exactly similarly situated in another block, for instance; but I am giving the average. In the tiers of lots north of Jefferson Street the prices naturally shaded off as they got further from the business district, the present business district. About in the first tier of lots they would shade off about 33 per cent, beginning on First and continuing, Second, Third,—33 per cent of the values that obtained south of Jefferson Street. Then in the next tier still north of that, there would be another drop of about 25 per cent with some exception. One of those exceptions is in the tier of lots on Third Avenue north of Jefferson Street, where there are quite a number of the best residences in Seward. The lots there are higher in value, or were, than they were in south of Jefferson Street, by reason of that fact. Then another tier of lots on Second Avenue, where a slight knoll existed, and which gave them an elevation over all other property was still higher. That was a little local and exceptional condition which gave a special value to those; but the general rule was that each tier of lots took a step lower as they got away from the business district in value.

Q. With that estimate which you have made as to the values, basing [47] it upon the facts that you have detailed to the jury, and have given the value of

(Testimony of J. E. Ballaine.)

those lots in the then present business district, what was the value of those lots lying farthest out, and which you placed the lowest value on; what would that value be at that time?

A. The value was about \$500.00 a lot; probably the lowest, about \$400.00. In the case of about five or six lots, that were deep down into a depression, in the extreme northwestern corner, the value was about \$350.00 for five or six lots."

The witness arrived in Alaska the latter part of May. The *lis pendens* was filed on the first day of May.

"Q. After the filing of this suit Mr. Bellaine, were you able to sell those lots at any price?

A. I was not.

Mr. BRONSON.—I object to that, if your Honor please, as being incompetent, immaterial and irrelevant and not tending to establish the proper measure of damages in this case.

Mr. GRAVES.—If counsel will suggest the proper measure.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. After the filing of the *lis pendens* I was unable to sell any of my property at any price, and during the pendency. The *lis pendens* was filed in the record at Seward on the first day of May. It remained on record clouding all my title all through the summer of 1915. The case came to trial, and the Judge—

Q. I think that is already in the evidence, Mr.

(Testimony of J. E. Ballaine.)

Ballaine. Since the judgment dismissing the case, and since the time for appeal expired, have you had occasion to determine the value of those lots?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not the proper measure of damages. [48]

The COURT.—Objection overruled. Exception allowed.

Mr. GRAVES.—I am not particular about urging it over the objection of counsel.

The COURT.—Then the question is withdrawn, is it?

Mr. GRAVES.—I think it is a matter that the jury ought to have.

Q. You may state, under the ruling of the Court.

Mr. BRONSON.—The question is not withdrawn? If not, then my objection stands.

Mr. GRAVES.—I will renew the question. Just read the question again, Mr. Stenographer.

Q. (The original question read.)

A. I have.

Q. So as to abbreviate it, you having enumerated the different classes of your lots, has that price been greater, or less than the value that you placed upon the lots.

Mr. BRONSON.—Ask him for the prices.

Mr. GRAVES.—I am asking as to his judgment of the value.

A. My judgment of the values may be shown by the fact.

Q. You can only make up your judgment as to the

(Testimony of J. E. Ballaine.)

market conditions, and sales, and the like. You are familiar with those, are you? A. Yes.

Mr. BRONSON.—I make the same objections as to the preceding question.

The COURT.—Objection overruled. Exception allowed.

Q. Have you in mind my question? Was it greater, or less? A. Much less.

Q. Now, having in mind the values which you placed in your judgment that this property bore prior to this suit, what would you say that value was after the termination of that suit, as I have heretofore asked you?

Mr. BRONSON.—I object to that as incompetent, immaterial and irrelevant, and not the proper measure of damages. [49]

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. That is, if you can state it in percentage.

A. All through the summer of 1915, while—

Mr. BRONSON.—That is not the question.

Q. I am asking you since that time.

A. Well, during 1916, after the determination of the suit, there was still the period of appeal.

Q. That was included in my other question. State since the time for appeal expired.

A. That would be since November 9th, 1916.

Q. Yes, sir.

A. There has been no market at all for the property there.

(Testimony of J. E. Ballaine.)

Q. Have there been any sales in any quantity that you knew of?

A. None in any quantity. There have been a few small sales.

Q. From sales that have been had, what would you say were the values upon those lots that were sold?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not the proper measure of damages.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. Generally about 50 per cent below the values at which property was selling in 1915.

Q. Mr. Ballaine, at the time of the initiation of this suit, the commencement of this suit, in April, 1915, didn't you have contracts or agreements? I don't care if they were in writing, or agreements for sale that had not been consummated.

Mr. BRONSON.—I object to that as leading, incompetent, immaterial and irrelevant, and not tending to establish the proper measure of damages.
[50]

The COURT.—Do you propose to follow that up with some evidence of the breach of this contract?

Mr. GRAVES.—My purpose,—I will state to your Honor, is to show some special instances in which there was a direct loss upon some of these lots.

The COURT.—If so, the contract, as I understand the decisions,—you can bring a right of action on the contract.

(Testimony of J. E. Ballaine.)

Mr. GRAVES.—It is not for the purpose of showing written contracts, but he had offers which he had accepted, of sales which were not afterwards carried out by reason of this.

The COURT.—Being concerning real estate, and oral, they were not within the statute?

Mr. GRAVES.—Yes, sir.

The COURT.—Objection overruled. Exception allowed.

A. I had entered into quite a number, I should say, between twenty and thirty, offhand, of contracts, either in writing, or verbal, oral, not contracts; some of them were in the forms of options, and prospective purchases, in some cases, by taking an option on certain property at a certain price, and they paid down on the option. They were not obligated to carry through their purchases.

Mr. BRONSON.—I renew the objection and move to strike out the answer, showing that there is nothing definite, and only preliminary.

The COURT.—I assume that it is preliminary, and he is intending to follow it up with something definite. The objection is overruled. Exception allowed.

Q. Were those agreements carried out by the parties, or were they abrogated?

A. They were abrogated immediately on the filing of this *lis pendens*. [51]

Q. Now give us a special instance of some sales in which you had offered to sell, and the other parties that offered to buy, and the prices fixed?

(Testimony of J. E. Ballaine.)

Mr. BRONSON.—I make the same objection to that as to the previous question.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. One instance was the Alaska representatives of the Fisher Flouring Mills Company here in Seattle, took an option.

Q. Just state the lots and the prices, is all I want, and the parties.

A. An option on one lot, and three small fractions adjoining in the southeast corner of block 1, for \$4,000.00. They paid down an option of \$100.00. As soon as the *lis pendens* was filed they notified me that they would not take up the option on that account, that the title was clouded.

Q. Any others?

A. J. H. Sears, who had gone to Seward ahead of me, representing New York interests, had taken an option on the tier of lots in block 20— No, it is the block just north of 19. I can't quite place the number of it. It is just north of 19 on Railroad Avenue. He had taken an option on a tier of lots facing Railroad Avenue on which to erect a stamp-mill, and he had come out to engage in mining enterprises. They were to put in the sampling works and stamp-mill at that place. It was right along the railroad, and the ore could have been delivered direct from the cars. That option was not carried out after the filing of the *lis pendens*.

Q. Do you recall the prices that were agreed upon?

(Testimony of J. E. Ballaine.)

A. My recollection is that the prices there,—I made them a special price of a thousand dollars a lot.
[52]

Q. How many lots?

A. I think there were ten in that group.

Q. Generally speaking, can you give us your best recollection, the number instances, not particularly the number of lots but the number of instances in which you had contracts, or options for sales, which were not taken up?

A. I had negotiated with Mr. Fowler, a wholesale grocer in Everett—

Q. Without naming special instances, can you tell me about how many, just the number?

A. Probably not less than twenty, and not more than thirty. It is so long ago that I would not attempt to say.

Q. What became of those agreements?

A. They were all dropped immediately on the filing of the *lis pendens*.

Q. What would you say, roughly speaking, was the number of lots that were covered by those 20 to 30 agreements?

A. I was in negotiations with different persons during the period before the filing of this suit for sales which would have covered in all not less than 200.

Mr. BRONSON.—I think this has merged now into the realm of speculation to the last degree.

The COURT.—I do not think he is answering the question. The objection is sustained. You were

(Testimony of J. E. Ballaine.)

asked about options that were dropped, how many lots that that covered.

Q. (Mr. GRAVES.) Just answer that first as to the 20 or 30 on which you had agreements.

A. Orally, or in writing?

Q. Either written or oral.

A. Well, of course, the oral agreements were in such varied stages of completion, or partial completion, that it would be hard to draw the line on them. Those that were in writing, I could give you the approximate numbers. [53]

Q. I will ask you this then: What were the numbers of lots that were involved in contracts, either in oral, or in writing, and involved in offers which had been made to you to purchase, but the negotiations had not yet concluded, and in which the negotiations ceased upon the filing of this suit?

Mr. BRONSON.—That is objected to as being wholly speculative, and problematical, and it is incompetent, immaterial and irrelevant.

The COURT.—The objection is overruled. Exception allowed.

A. Well, I had given definite options in writing on about not less than thirty lots up to the time before I left Seattle for Seward. That is to say, before the filing of the suit, and between the time of the President's official designation of Seward as the terminus of the railway system on the 10th of April, and the filing of the *lis pendens* on the 1st of May, twenty days, I had entered into definite options, or given definite options, on not less than thirty lots.

(Testimony of J. E. Ballaine.)

Q. Were those lots in the business part of town?

A. Yes, sir, those were in writing.

Q. Were they largely in the business part of town as you have heretofore described it?

A. All but this group to Mr. Spears, when he had contemplated putting up the sampling, or concentrating mill. That might be described as being just outside of the business district, except that it was on Railroad Avenue. He wished a site where the cars could deliver ore direct to the property.

Q. In addition to those, had you entered into negotiations with parties who were offering to purchase lots? A. I had.

Q. How many of that character?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not a proper measure of damages. [54]

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. I don't remember the number so definitely as I remember the people I was undertaking to locate there, some large instances.

The COURT.—He did not answer about the number. If you can't answer say so.

A. I would not attempt to give the definite answer as to the number, because people were calling me up by telephone every day.

Mr. BRONSON.—If you can't answer say so.

Q. (Mr. GRAVES.) Were you, before the institution of this suit, inquired of regarding those lots,

(Testimony of J. E. Ballaine.)

and regarding sales? A. I was.

Q. By prospective purchasers?

A. Yes, sir, by great numbers every day; probably not less than twenty or twenty-five people every day.

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled. Exception allowed.

Q. After the institution of this suit were those negotiations resumed by the parties?

A. No, sir, none of them, not in a single case. No one of the written options was exercised.”

Witness first became interested in the townsite in August, 1903. He and his brother had owned it ever since and prior to the institution of the suit. Neither the Alaska Northern or the Alaska Central had demanded it or a settlement concerning it, directly or indirectly. He had known Boland only slightly and casually prior to the bringing of the suit; had never met Stavert and had met Jemmett probably half a dozen times. Witness had been interested in the Alaska Central Railway at its beginning and was a director. [55]

“Q. Between the commencement of that Alaska Northern suit, and the time of its trial, had you ever any talk with Mr. Boland, or either of the other defendants, or any of them?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled. Exception allowed.

(Testimony of J. E. Ballaine.)

A. I did.

Q. With whom? A. Mr. Boland.

Q. Where?

A. Several different places. I wired him immediately on my notice that this suit had been filed, I wired Mr. Boland and Mr. Jemmett offering to open my books and have the books of the bank and the railway company opened to their inspection to prove the falsity of all their charges. That was within a day or two after the announcement in the 'Times' that the suit had been filed. The first time I met Mr. Boland in person after the filing of the suit, as I recall it, was in New York, in about July,—no, about August, sometime in August, when we took the deposition of Mr. Keeler, who had been the dispursing agent for the Shedd's, and the treasurer of the Tanana Construction Company when I owned the controlling interest in the Construction Company, and I there renewed my offer to Mr. Boland to open my books and have the books of the companies, and the books of the banks, opened to his inspection, or the inspection of anybody who he might appoint to approve the entire falsity of all their charges, and they are complete, and Mr. Boland was present as the representatives of the plaintiffs, the Alaska Northern, at the taking of the deposition of Mr. Keeler in New York, when Mr. Keeler explained in detail the matter of the payment of this \$4,000 was subsequently submitted to the Court in Seward. Then subsequently, in about the fore part of October of the same year, Oh, no, in the latter [56] part of Sep-

(Testimony of J. E. Ballaine.)

tember of the same year, Mr. Boland arrived in Seattle, enroute to Valdez and Seward, to attend the trial of this case. We then took the depositions of bankers here in Seattle, who had kept the accounts of the Alaska Central, and the Tanana Construction Company, and of my personal accounts. During the taking of the depositions the bank books were all open to the inspection of Mr. Boland. I invited him to call for anything he wished to call for, but reserved nothing. I offered to produce every document that he required, to prove the falsity, and that invitation was never acted upon by him at any time.

Q. He was present when Mr. Keller gave his testimony?

A. He was present as the local representative, the attorney for the Alaska Northern, and appeared as such.

Q. What was your purpose in offering this information of Mr. Boland, prior to the trial of the suit?

A. My purpose was to avoid the losses that the suit was causing me, the financial losses, and to show my good faith in proving that they were entirely wrong in the allegations that they made in their complaint.

Q. After you had given this information to Mr. Boland, opened those sources of information to him, which you have mentioned, did he dismiss the suit?

A. He did not.

Q. It was prosecuted until the final judgment was entered, which was read in evidence yesterday?

A. It was.

In the taking of the depositions here in Seattle, for

(Testimony of J. E. Ballaine.)

the banks, and in the taking of Mr. Keeler's disposition, the bank books were opened showing the transfer to my personal account, to the account of the Tanana Construction Company, of this \$4,000.00. [57] In the taking of these depositions that was also shown that my brother who represented me at Seward had gone to Juneau, and was taken sick, and was in the hospital sick in Juneau when this note came due, and I was in the east, and knew nothing of his sickness, and consequently—

The COURT.—You are not going into the merits of the other suit, are you?

Mr. GRAVES.—I don't want to go into that. That is all covered by the findings.”

At the time negotiations were on to sell the Alaska Northern to the Government the witness appeared as a witness before a committee of Congress and also before the Secretary of the Interior. The witness was asked whether or not he had not made statements on these occasions showing a different value for the Alaska Northern than its owners were claiming. The Court sustained defendant's objection to this question and the following statements were then made:

“Mr. GRAVES.—If your Honor please, my reason for tendering this is to show the circumstances that would lead to the question of malice, that upon the attitude assumed by this plaintiff, that there is a fair opportunity for the Court and jury to draw the presumption that retaliatory measures were taken by means of this suit. If your Honor will bear with

(Testimony of J. E. Ballaine.)

me for one second, I make the statement to the Court that I expect to follow it up.

Mr. BRONSON.—This is an attempt on the part of the plaintiff in this case to prove our malice by his acts. I do not question for a moment that he can prove our acts to show bad faith, but I never heard anybody heretofore try to prove our bad faith by showing his action toward us. That is what he is attempting to prove here now. He is attempting to show that he did something that we probably did not like. That is what it amounts to.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception. [58]

The COURT.—Exception allowed. But, gentlemen of the jury, it is a great deal like a conversation. You can't understand what one man meant unless the Court lets in what the other man said. So, here the Court is going to allow Mr. Ballaine to answer the question, but it has no bearing on what he said, except as it explains what Mr. Boland later on said. Exception allowed."

Witness said he knew George H. Patrick and that he was a professional lobbyist before Congress representing the Alaska Northern when the road was sold to the Government and that he made a certain statement to witness after witness had appeared before the House and Senate Committees and showed from the books that the costs of certain parts of the road were about fifty per cent less than claimed by the Alaska Northern.

"Mr. BRONSON.—I make the same objection. I

(Testimony of J. E. Ballaine.)

don't concede that counsel has tied up Mr. Patrick in such a way as to authorize him to make statements for Mr. Boland, and Mr. Stavert, and Mr. Jemmett.

The COURT.—The objection is overruled; but, gentlemen of the jury, you will understand that there has been some evidence here, conversation by Mr. Boland, referring to Mr. Patrick, and also testimony by Mr. Boland referring to Mr. Patrick. Unless Mr. Patrick was at this time, or the man that he contemplates testifying about, was acting for, or with Mr. Boland, you will disregard entirely the answer."

* * * * *

“Q. Is this George H. Patrick that you referred to the same Mr. Patrick that Mr. Boland claims to have advised Mr. Boland to bring this action?”

A. The same Mr. Patrick, yes, sir.

Q. Did you afterwards, after these statements which you have made, did you have a conversation with Mr. Patrick? A. I did. [59]

Q. What did he say?

Mr. BRONSON.—I renew my objection.

The COURT.—Objection overruled. Exception allowed.

A. He asked me to desist from my showing before the committee to the effect that the cost of the railroad was less than the cost that he, Mr. Patrick and Mr. Jemmett, who was with him in Washington, were representing. They had represented the property to cost about \$6,000,000, as it was said, and Colonel Swanitz was at the same time in Washington making some representations—

(Testimony of J. E. Ballaine.)

Q. Go right to the conversation of Mr. Patrick. What did Mr. Patrick say to you?

A. Mr. Patrick told me very angrily that unless I did desist that they would retaliate in a way that I would feel. Those were his exact words.

Q. What time was that with reference to the time of the commencement of this suit?

A. This conversation with Mr. Patrick, it was with Mr. Patrick and Colonel Swanitz together, about the middle of May, 1913. It was a little earlier than that. It was about May 10th, of 1913."

Cross-examination.

Witness severed his connection with the Alaska Central in 1908. He acquired the information given the Congressional Committees while a director. He did not think Patrick ever practiced law in his life but that he was a professional lobbyist getting \$100.00 per month from the Alaska Central. Colonel Swanitz, the chief engineer, was trying to gouge the Government for about \$3,000,000.00 by overvaluing the road.

In August, 1903, an arbitrary value was put on four blocks of lots, \$750 for inside lots on Fourth Avenue and \$1,000 for corners, or about \$20,000 per block. That the four blocks were valued in the [60] aggregate of about \$50,000. The filing was made in August, 1903, and patent issued in May. The witness was asked whether or not he had not paid the Government \$3,000 and \$4,000 had already been paid by the Railroad Company or the subsidiary construction company for the relinquishment and replied

(Testimony of J. E. Ballaine.)

that this was not the fact at all. Plaintiff's counsel objected to going into the matter on the ground that it was all shown in the Finding and Conclusions in the Alaska Northern suit already in the record as Plaintiff's Exhibit I. Defendant's counsel stated that he wished to show that there was probable cause for the Alaska Northern suit by showing that the company paid more than half the purchase price of the land just before the said values were put on. Counsel for plaintiff renewed his objection and added:

“Mr. GRAVES.—As a further fact, I would state too, as a part of my objection, and that is, it is our contention, and so stated, as I understand to be the law, that want of probable cause is conclusively presumed where there has been a favorable decision in the suit.”

“The COURT.—I don't agree with Mr. Graves in that.”

The Court, however, held that these matters could not be inquired into on the ground that they had been conclusively established by the former suit and the line of inquiry was shifted to the matter of sales testified to by witness.

“A. I arrived in Seward in the latter part of May, 1915.

Q. Did anybody represent you in the matter of sales previous to the time you went up there?

A. No, sir, I hadn't made any sales up there.

Q. You had no sales in process previous to the time when you arrived up there?

(Testimony of J. E. Ballaine.)

A. The sales I made, or contracts for sales, were here in Seattle.

Q. You made sales here in Seattle? [61]

A. Yes. My efforts were at that time to locate in Seward several large establishments that would be permanent there.

Q. I am coming to that in a minute. All those trades that you spoke of were in Seattle?

A. Yes, sir.

Q. Did you enter into contracts with people in Seattle to sell those lots? A. Yes, sir.

Q. And did they pay you a part of the purchase price down? A. They did.

Q. And agreed to pay the balance of the purchase price on future payments?

A. No, sir; most of those were options.

Q. Were all of them options? Were they all options? A. They were all options at that time.

Q. In other words, they were agreements in which the vendee could conclude if he wanted to?

A. I think I must claim that one of those was by cable from Seward. The others were here in Seattle, and one was consummated by cable between Seward and Seattle.

Q. Did you take substantial payments down on those options?

A. The usual amount of an option.

Q. What was that?

A. About five per cent, is the customary amount.

Q. Over what time would those options be extended?

(Testimony of J. E. Ballaine.)

A. If it is material, I think I can get the original options here.

Q. I want you to give it approximately.

A. Usually about thirty, sixty, and ninety days. I don't think any two of them were for the same period. It would give people time to go up and look over the property and see the location.

Q. Were those options all by people who would go up and look at the property before they completed the trade? [62]

A. Yes, sir, except in the case of the Fisher's Flour Mill Company. Their representative was already at Seward.

Q. Where did they afterwards establish their place up there?

A. None of them established in Seward.

Q. Didn't the Fisher Flour Mills buy any place up there?

A. I have heard that they have headquarters at Anchorage, but I don't know about that.

Q. They did not, as a matter of fact, establish any place of business in Seward? A. Not in Seward.

Q. What about those people from New York that were going to establish a stamp-mill, did they establish a place? A. No.

Q. They did not?

A. No. Mr. Fowler did; but Mr. Fowler didn't buy at Seward. He went to Anchorage, and put in his wholesale house there.

Q. Why did he go to Anchorage?

A. He never gave me any explanations as to why."

(Testimony of J. E. Ballaine.)

Witness sold some lots to C. B. Dodge in the fall of 1916, at \$1,000 each on terms of 20 per cent down and 20 per cent a year. The last payment was still due; Seward was designated as the terminus of the Government road by the President about April 10th.

Redirect Examination.

The witness was asked where the so-called Poland tract was with reference to Seward.

“A. The Poland tract—Seward is on a little bight of land that goes out from the mountains, and the head of the Bay extends on about a quarter of a mile north of the north line of Seward, possibly a half a mile, and then the Poland tract begins at the head of the Bay. The Poland tract covers 320 acres. The western boundary line of the Poland tract would be almost a continuation of a line running through Seward about the middle, and then it runs [63] up in a square. The eastern side strikes the Bay again about a half a mile, I should judge, from the western side. It goes right down to the head of the Bay, and it has about a half a mile frontage on the head of the Bay.

Q. You prepared for me a rough sketch on yesterday, and I see here you have ‘Seward’ marked on this plat; by that you mean the present townsite of Seward?

A. Yes, sir; that is the present townsite of Seward.

Q. And the Poland tract is the tract you last referred to? A. Yes, sir.

Q. What is meant by these two words ‘Reserved tract’?

(Testimony of J. E. Ballaine.)

A. That is a tract of 223 acres granted by Act of Congress in 1906, directly to the Alaska Central Railway Company on the payment of \$1.25 an acre.

Q. Did that reserved tract pass to the United States Government on the transfer of the property holdings of the Alaska Northern?

A. Passed to the Government?

Q. Yes, sir.

A. No; it was reserved out by this committee which Mr. Boland represents.

Q. It was transferred to the United States Government in 1915, and it was reserved from that transfer, and held by this committee?

A. No; that is practically so, but the exact situation is this: It belonged to the Alaska Central originally, and when the Alaska Central was sold at foreclosure sale, it was bid in by F. G. Jemmett, trustee, that is all the assets of the Alaska Central; then, F. G. Jemmett, trustee representing some people whom Mr. Boland represents, the twelve banks in Canada which took over the Sovereign Bank of Canada, Mr. Jemmett, Trustee, in turn, conveyed to the Alaska Northern by deed of record in Alaska, all the assets which he bid in, except this reserved tract, [64] That exception is stated by deed of transfer.

Q. So it never went to the Alaska Northern, but still remained with this syndicate in Canada?

A. Yes, sir, it is still in that syndicate.

Q. I show you this sketch. Resurrection Bay is marked there; that indicates roughly the bay?

A. Yes, sir, the upper end of the bay.

(Testimony of J. E. Ballaine.)

Q. Where you say 'Seward,' that represents roughly the townsite which you are interested in?

A. It represents 160 acres, on the incorporated limits of Seward, extending up to the—

Q. Extending up to the middle of the Poland tract?

A. Yes, sir.

Q. But that represents your townsite?

A. That represents the original 160 acres which we platted, the incorporated limits run 500 feet west of the west line of our tract, and due northerly to the middle of the Poland tract. I have made the dotted lines there.

Q. I wish you would make with dotted lines the extent of it.

A. That is approximately the incorporated limits of the town. (Marking.)

Q. I have marked here the words 'corporate limits,' so as to indicate that?

A. Yes, sir. To be exact, the line of the corporation runs 500 feet west of the west line of Seward, and continues due northerly to the middle of the line of the Poland homestead tract, and then westerly to the extreme easterly side of the reserved tract.

Q. You mean the easterly to the extreme?

A. Yes, sir, easterly to the extreme. I think it is the extreme easterly. It is very close to that.

Mr. GRAVES.—For the purpose of reference, I would like to introduce that plat for what it is worth.

Mr. BRONSON.—I would like to ask the witness one more question. [65]

(Testimony of J. E. Ballaine.)

Recross-examination.

(By Mr. BRONSON.)

Q. You are not pretending, Mr. Ballaine, that this is accurate with reference to distance, or anything like that?

A. That is just a rough pencil sketch, approximately so.

Q. For instance, what you have Seward, 160; you mean that is the townsite?

A. That is our original townsite, 160.

Q. There are some tracts intervening between that and this Poland tract, aren't there?

A. Yes, sir; there are 60 acres belonging to the Government, and 40 acres belonging to what was known originally as the Laubner homestead.

Q. That would make a little difference in this plat?

A. Of course, that is only a pencil sketch.

Q. Isn't there a third intervening piece in there?

A. No; the Government platted a little strip called 'Bay View strip,' I think, but that runs up on the side of the Government 60 acres, and on the west side of the Laubner tract, and then upon the west side,—well, it just joins the southwest corner of the Poland tract.

Q. There is the terminal tract, the Laubner tract, and the United States Government tract, and the Lake View, or Bay View tract, are reserved?

A. The terminal tract, and the Government tract are one and the same.

Q. Are you sure about that?

(Testimony of J. E. Ballaine.)

A. The official name of the Government tract is the Terminal tract.

Q. Take a look at this blue-print and see if that does not show.

A. This is the Government tract.

Q. There are three tracts intervening?

A. That is reserved. [66]

Q. There are three tracts of land.

A. There is no location on it. I could not get at the distance between those two.

Q. What is it, about three miles?

A. Oh, Lord, no, no. I can give you the exact distance in feet, if you will give me that map.

Q. This one here? A. Yes, sir.

Q. (Handing witness map.)

A. (Witness continuing.) Well, it is about twenty-two hundred feet from the northwest corner of our property to the southwest corner of this property here.

Q. Where is the main business district?

A. Right here below Jefferson Street.

Q. You could not go upon those two properties, from one to the other, in any such distance?

A. No. There is an automobile road built by the Government across some flats. There is tide-flats in that little lagoon.

Q. But there wasn't at that time?

A. Yes, sir, there was a road— At what time?

Q. Was there any automobile road? A. When?

Q. At that time, in 1915.

A. Oh, yes; the Government built the road there—

(Testimony of J. E. Ballaine.)

Q. When did the Government start in to do it? I am talking about 1915.

A. That road was built about 1908.

Q. Across the tide-flats?

A. Oh, yes, sir, it has been built clear up to the head of Resurrection Valley, about seven miles.

Q. How long do you suppose it is from the business district of Seward out to the Poland tract? [67]

A. By the railroad ties?

Q. I mean by the way you go other than railroad?

A. About a mile. But the Poland tract, the whole southern side of the Poland tract, it abuts squarely on the head of the bay.

Redirect Examination.

(By Mr. GRAVES.)

Mr. GRAVES.—I offer this in evidence.

Mr. BRONSON.—I have no particular objection. It is not accurate. The witness admits that. There is a great deal of the distance between the two tracts which he does not indicate on that plat.

Mr. GRAVES.—The witness has given the distances.

The COURT.—It may be admitted.”

This exhibit was marked Plaintiff’s Exhibit 4, and as such is attached and made a part of this bill.

Recross-examination.

The witness said his title was involved by the Alaska Northern suit until November, 1916, because there was a right of appeal and West had announced that he would exercise it. Here the examination of

(Testimony of J. E. Ballaine.)

the witness was concluded and the following motion made by defendant's counsel:

“Mr. BRONSON.—I move to strike out the evidence with reference to what Mr. Patrick said as not having been connected up with the defendants in any way. It was admitted by the Court on the supposition that it might be connected up.

Mr. GRAVES.—It is useful for two purposes. The testimony of Mr. Boland that Mr. Patrick was representing him. It is also the testimony of Mr. Boland that Mr. Patrick is the gentleman who gave him advice, which he followed in good faith, and it goes to the good faith of the advice given by Mr. Patrick as to the [68] bringing of this suit. He says that he brought it upon the advice of Mr. Patrick. Mr. Boland had the same information that Mr. Patrick had regarding this, which had already been given to him by Mr. Haight, and Mr. Patrick was there at the time of this transaction, according to Mr. Boland's own statement. He was representing this corporation, and representing this committee.

Mr. BRONSON.—I don't think Mr. Patrick's motive has anything to do with it. If I can come to a lawyer and ask his advice with reference to a state of facts, and submit the facts to him which relate to a transaction of a case against another party, and I relate the facts fully to him, and he tells me that I have a cause of action, or that I have a reason for the prosecution of the other case, the fact that he might have in the back of his head some spirit of re-

(Testimony of J. E. Ballaine.)

venge towards this other party, has nothing to do with me.

The COURT.—The motion is denied.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

Additional Testimony of James A. Haight.

Mr. HAIGHT, being recalled, said that Boland was mistaken when he said that he (Haight) had told Boland at Toronto that Ballaine had told him that he had paid \$4,000 for the property because he had never discussed the matter with Ballaine until August, 1915, after which time he wrote to Boland and secured his or his associate's permission to accept a retainer from Ballaine and defend him in the suit.

Motion for Directed Verdict.

At this point plaintiff rested and counsel for defendant challenged the sufficiency of the evidence to support a verdict and further moved the Court to direct the jury to return a verdict for [69] the defendant. After argument the motion was by the Court denied, an exception to the ruling being asked, and by the Court allowed.

Excerpts from Deposition of George H. Patrick, for Defendants.

The depositions of George H. Patrick and T. C. West were published, the same having been taken on stipulation and order of the Court. To the deposition of Patrick were attached a number of letters as

exhibits, which were duly admitted by the Court and read to the jury following the reading of the deposition. The entire deposition and exhibits therein referred to are attached to and made a part of this bill, but the material parts of the deposition itself are here set out for the convenience of Court and counsel.

Mr. Patrick testified:

That he had practiced law about fifty years, the last twenty in Washington, D. C.; that he was acquainted with the parties in this cause and with the parties in the Alaska Northern suit. That he had known Colonel Swanitz, chief engineer of the Alaska Central and Alaska Northern Railways. He was asked to state in his own way his connection with and his acquaintance with the facts and witnesses in the Alaska Northern suit against the Ballaines and what advice if any he gave to the defendants in this action, particularly W. J. Boland and W. E. Stavert with reference to bringing the former action. To which question he replied:

“A. I was the attorney,—called the general attorney of the Alaska Northern Railway Company from January, 1910, the date of its organization, until that railway was sold to the Government of the United States. I was located in Washington all the time in correspondence with all the officials of the company wherever they were located, constantly receiving inquiries for advice and instructions, which I gave, as well as attending to whatever matters the company might have in Washington. I knew Colonel Swanitz very well, received a great many communications from him, and my first information of any [70]

ground for a suit by the company came from him in a letter written by him to United States Senator Chamberlain, bearing date June 2, 1913, which I received a few days later from Colonel Swanitz. Reference was made therein to the townsite, and I at once inquired of him concerning it. I received a considerable number of letters from him bearing on the subject and I wrote a number to him, and I had several conversations with him about the matter here in Washington.”

The witness produced copy of the Swanitz letter to Chamberlain sent to him by Swanitz and the same was attached to the deposition and with the same as aforesaid is attached to and made a part of this bill.

The witness also produced from his files, and identified certain letters, in Swanitz’s handwriting, which were attached as exhibits to the deposition as follows:

Letter from Swanitz to witness dated July 3, 1913, marked Exhibit 2.

Letter from Swanitz to witness dated July 30, 1913, marked Exhibit 3.

Letter from Swanitz to witness dated July 30, 1913, marked Exhibit 4.

Letter from Swanitz to witness dated Aug. 17, 1913, marked Exhibit 5.

Letter from Swanitz to witness dated Jan. 15, 1914, marked Exhibit 6.

Letter from Swanitz to witness dated Feb. 11, 1914, marked Exhibit 7.

Letter from Swanitz to witness dated Feb. 14, 1914, marked Exhibit 8.

Letter from Swanitz to witness dated Sept. 10, 1914, marked Exhibit 9.

Letter from Swanitz to witness dated Nov. 3, 1914, marked Exhibit 10.

Witness also produced a document purporting to be a copy of a letter from E. R. Keeler to John E. Ballaine, dated September 23, 1904, which was sent to him attached to Colonel Swanitz's letter of February 11, 1914, Exhibit 7.

Witness was asked what advice he gave to Boland, Stavert and Jemmett, or either of them.

"A. I advised them that in my judgment the facts communicated to me showed that the Seward Townsite had been purchased with money belonging to the Alaska Central Railway Company, or the construction company [71] which was the same thing; that Ballaine constituted himself a trustee holding for the company and that the title and possession of the townsite could and should be recovered by the Railway Company and be made a part of its assets. I also advised them, at least I advised Messrs. Stavert and Boland—I am not sure as to Mr. Jemmett—although I believe I did tell him the same thing—that in case action should not be brought by them they might be held liable for not having faithfully collected and turned into the treasury of the company one of its most valuable assets.

The witness further testified that he had been told that Boland, Stavert and Jemmett were trustees for the bondholders of the Alaska Central, and had seen the receipts given for the bonds deposited with them and knew from the bondholders and the conveyances

that they had transferred the assets of the Alaska Central to the Alaska Northern, which was organized to purchase them and operate the road, which it did. At the time witness first heard of the townsite claim, W. E. Stavert was president and F. G. Jemmett was treasurer of the Alaska Northern, these men being two of the named defendants on this action.

Witness knew the Shedd's of Chicago, who were bondholders, but did not remember discussing the ownership of the townsite with them though he saw some letters of one of the Shedd's in the hands of Swanitz who told him that the Shedd's "would almost certainly, and they expected to proceed against the trustees to hold them for any deficiency in the distribution of the proceeds for the railroad if it should appear that suit ought to have been brought or that suit might have been brought with a reasonable chance of success."

"Q. Did he make any statement as to what their claim was so far as the townsite of Seward was concerned?"

"A. Yes; that their claim was that as part owners of the Alaska Northern Railway Company, the right, title and interest that that company had in Seward was something to which they might and [72] should look for the satisfaction of their bonds."

Witness said he knew of the firm of Bicknell, Bain, Macdonnell & Gordon, solicitors at Toronto, Canada, and had had correspondence with them, that he knew from various sources that they represented certain

banks in Canada which had taken over the assets of the Sovereign Bank of Canada, which was the very large majority owner of the Alaska Central securities and the road after sale.

The witness said the said firm had inquired of him about the townsite matter and produced carbon copies of letters written to Bicknell, Bain, etc., on September 12, 15, and 16, which were attached to the deposition as Exhibits 11, 12 and 13. To the letter of September 16, that is, Exhibit 13, was attached copies of the Swanitz letters to Patrick.

The witness also produced from his files a carbon copy of a letter written to the defendant Stavert which was annexed to the deposition as Exhibit 14 and with all of the foregoing exhibits is made a part of this bill.

The witness further testified as follows:

“Q. Did you have any doubt about the statements contained in Colonel Swanitz’s letters and in his interviews with you, I mean as to the correctness or reliability of what he stated.

A. None whatever. Everything that he stated to me that I had an opportunity to investigate was amply confirmed.

Q. As a result of the conversations and the correspondence which you had an opportunity to examine, what was your opinion as to the result of an action that might be brought to recover that townsite?

A. It was my opinion that the action must certainly result in the recovery of the townsite and I so advised Mr. Stavert, the president, Mr. Boland, Mr. Bicknell’s firm, Mr. Jemmett and also Mr. G. T.

Clarkson who represented the Canadian Banks, for whom Bicknell, Bain, Macdonnell & Gordon appeared as counsel.”

The witness further testified: [73]

“I never had any doubt whatever of the fact that Colonel Swanitz, by his own evidence and the documents he had and asserted his ability to get and the evidence of other witnesses he repeated to me would establish clearly the right of the railroad company to this townsite. Colonel Swanitz was extremely earnest in his assertions of what proof could be made to sustain this contention. He brought Mr. Thomas C. West of San Francisco here to consult with me about the case, to go over the facts and the law bearing upon them with him, and he was present at Mr. West’s and my interviews confirming whenever I quoted as coming from him.

Q. You also had rather strong views as to the duties and obligations of the trustees and as to the responsibility that would be imposed upon them in case action was not commenced?

A. I had; I had good reason, as I thought, to fear that action would almost certainly be taken against them if they did not bring the suit, and I advised Mr. Stavert and Mr. Boland, I know, that I thought it might be necessary for their own self-protection to bring the suit, even if they failed to maintain it, under all the circumstances.

Q. But you never had any doubt of the result, if the evidence could have been obtained according to Colonel Swanitz’s statements? A. I had not.”

Excerpts from Deposition of T. C. West, for Defendants.

Defendant's counsel read to the jury the deposition of T. C. West, taken on stipulation before James Mason, a notary public, at San Francisco. This entire deposition is attached to and made a part of this bill, but for the convenience of Court and counsel its salient parts are here set out as follows:

Mr. West testified, that he resided at 1204 Walnut St., Alameda, California, and that his law office was at 1170 Phelan Building, San Francisco; that he had practiced law twenty-six years [74] in all, and about seventeen in California; that he was acquainted with all the parties to this action except Mr. Stavert and that he was one of the attorneys for the plaintiff in the Alaska Northern suit against Ballaine. Witness was acquainted with Colonel Swanitz.

“Q. Mr. West, will you go on and state in your own way, your connection with and your acquaintance with the facts and the witnesses in that matter prior to the institution of the action, and what advice and counsel you gave to the defendants in this action and particularly to Mr. W. J. Boland with reference to the bringing of the former action?”

A. I had known Colonel Swanitz for probably a couple of years before the action was commenced. Mr. Boland, I had known personally for quite a long time before the action, and I believe I formerly knew him a great many years ago in Toronto. Mr. Jemmett, I had met once in Washington. The matter of bringing the action against the Ballaines was dis-

cussed very fully by Mr. Boland and myself and Colonel Swanitz, and I also consulted in this action with Mr. Patrick, an attorney in Washington, D. C. All the data necessary for the action was gathered during a period covering about a year, and I constantly urged the bringing of the action, but nothing was definitely settled as to its actual commencement until Mr. Boland came to San Francisco from Toronto to consult with me. Mr. Boland and I thereupon prepared the complaint and cabled it to Valdez, Alaska, to my agents there, Messrs. Donohoe & Dimond. The reason for cabling was, that there was some question as to whether or not the Statute of Limitation would run against the cause of action in case the suit was not started immediately after Mr. Boland arrived here.

Q. Will you state who Colonel Swanitz was with reference to any prior matters or business of the Alaska Northern or the Alaska Central Railroad?
[75]

A. Colonel Swanitz had formerly been the chief engineer for the Alaska Central Railway and was interested also in the Tanana Construction Company and in the Tanana Railway Construction Company. I understood from him that he had previously had access to the books, papers and documents of the Alaska Central and the Construction Company mentioned, and from my frequent consultations with him believed and still believe that he knew all of the facts upon which we relied for the success of the action. His familiarity with it, correspondence and papers which I afterwards had occasion to examine, con-

vinced me of his thorough knowledge of the matters that would arise in the course of the trial.

Q. Mr. West, Colonel Swanitz was afterwards a witness for the plaintiff in that action, was he not?

A. Yes.

Q. State whether or not his evidence as given upon the witness stand in the case agreed with substantially what he had told you his evidence would be in your interviews with him prior to bringing the action? A. No, it did not.

Q. Just state in your own way, if you will, whether the discrepancy was of a serious character or would produce good or bad effect upon the plaintiff's case in that case?

A. Yes, the difference in the story told on the witness stand and that told to Mr. Boland in my presence and to me personally on many occasions, was very great and in one respect very vital to the interests of the plaintiff. As an illustration, both Mr. Boland, Mr. Patrick and myself were always informed by Colonel Swanitz that the directors and officers, including himself, of the Alaska Central Railway Company and of the Construction Company mentioned, had always understood, and it was a matter of [76] general knowledge to them that the Ballaines held the townsite of Seward for and on behalf of the Alaska Central Railway.

Q. Was the Alaska Central Railway Company the predecessor in interest of the Alaska Northern Railway Company, the plaintiff in the former action?

A. Yes.

Q. Were Ballaines or either of them members of

the Directorate of the Alaska Central Railway Company?

A. John E. Ballaine was and I believe Frank Ballaine was also.

Q. Did you advise Mr. Boland whether or not in your opinion the Alaska Northern Railway Company had a good cause of action against the defendants Ballaine in that case to the recovery of the townsite which was the subject of the action subsequently brought?

A. Yes, I so advised them and still believe that action ought to have prevailed.

Q. Did you advise them, Mr. West, and do you know whether or not Mr. Patrick advised them, or if you do not know as to him, did you advise them yourself as to what was the duty of Mr. Boland, Mr. Stavert and Mr. Jemmett as trustees with reference to bringing such suit?

A. Yes, I advised Mr. Boland that it was his duty to bring the action in order to protect those for whom he and Jemmett and Stavert were trustees, and I understood from Mr. Patrick that he also had advised them to the same effect.

Q. Mr. Patrick is a practicing attorney at law in Washington, D. C., is he not?

A. Yes; of a great many years' experience, and Mr. Patrick was thoroughly familiar with all of the details of the Alaska Central and Alaska Northern, in fact, more familiar with them than any of us.

[77]

Q. What conversation did you have with Colonel Swanitz at any time prior to the bringing of this

former action with reference to Mr. Ballaine's relationship to the townsite?

A. I had a great many conversations with Colonel Swanitz, and in all of them where the matter was discussed, he informed me that John E. Ballaine never claimed to own the townsite personally, but that he always acknowledged that he was holding it for and on behalf of the Alaska Central Railway Company, and the first time I ever heard Colonel Swanitz say anything to the contrary was when interrogated on that subject at the trial of the action.

Q. And what was his evidence then?

A. When he stated that John E. Ballaine always claimed to own the townsite, which came to me as a complete surprise."

Testimony of W. J. Boland, in His Own Behalf.

Mr. Boland testified as follows:

That Mr. Jemmett, Mr. Stavert and himself were trustees representing the former bondholders of the Alaska Central Railroad. As such they foreclosed the road, bid in the assets for the bondholders, reorganized as the Alaska Northern and finally sold out to the United States Government, reserving the Poland tract and the rights to the townsite of Seward. Colonel Swanitz was the chief engineer of both roads. Mr. Dowdell was a Chicago contractor and had at one time been a director of the Alaska Central or one of its subsidiary construction companies.

"Q. When did you have this conversation with Mr. Dowdell anyway with reference to this townsite?

(Testimony of W. J. Boland.)

A. I don't remember the exact date. It was before this action was commenced. I saw Mr. Dowdell in the presence of Mr. Swanitz in the city of Chicago. I think it was at the Congress Hotel that Mr. Dowdell told me that Mr. Ballaine had at all times *had* admitted to him that he held the townsite of Seward for the Alaska [78] Central Railroad, and that he was prepared to swear to it.

Q. As a matter of fact, at the trial of the case did he swear to it?

A. He was examined on commission in Chicago. He was not present at the trial, but he swore to it, because I read the evidence."

The witness was asked what Colonel Swanitz had told him and replied:

"A. Mr. Swanitz told me that Mr. Keeler had made this \$4,000 payment in connection with the townsite of Seward at a time when he was in charge up there, and that the reason that the payment was made was because the townsite of Seward belonged to the railroad company, and that Mr. Ballaine had always admitted it belonged to the railway company. He also showed me the prospectus—

Mr. GRAVES.—What date was this?

A. I don't remember the date. It was on several occasions. It was once in New York, once in Mr. Patrick's office, once in the presence of Mr. Patrick, and Mr. West and myself in Chicago, and once in the presence of Mr. West and Mr. Dowdell and myself in Chicago. I don't remember the dates.

Q. Go ahead.

(Testimony of W. J. Boland.)

A. He also showed me a prospectus in which the statement was made that the townsite of Seward—I don't know whether it mentioned, or not, the terminus, and the other townsites would be opened up for the benefit of and be the property of the railway companies.

Q. This was the prospectus printed, a folder, or something of that kind.

A. It was a printed folder issued by the officers of the defendant construction company, or the railway company, which Mr. Ballaine afterwards admitted by his evidence that he caused to be issued.

Mr. GRAVES.—Just answer the question.

Q. (Mr. BRONSON.) Did Mr. Ballaine admit that he caused that prospectus to be issued?

Mr. GRAVES.—I object to that. [79]

The COURT.—Unless it was this before the trial of the suit the objection will be sustained.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. When did Mr. Ballaine make this statement?

A. About three years ago now, when we were taking evidence from the bank books in Seattle, and in the cross-examination Mr. Ballaine admitted it.

Q. But it was after the suit had been brought?

A. After action had been commenced, yes.

The COURT.—The objection is sustained. Exception allowed."

Continuing as to Colonel Swanitz, the witness said:

"A. Colonel Swanitz said that he had books, papers and documents that he had gone over with

(Testimony of W. J. Boland.)

Mr. West, and that there wasn't any question but the townsite was the property of the Alaska Central Railroad; in addition to that, Mr. T. C. Hanson, who himself was a lawyer, a bondholder, told me that he had gone over the facts in connection with it, and that he was satisfied that the townsite was the property of the Railroad Company, and if we didn't take action, that he would take action when the transaction was completed against the trustees for not proceeding."

The witness explained that Hanson was a lawyer and banker in Milwaukee and continuing as follows:

"A. Marion Butler, of Butler and Vaile of Washington, claiming to represent minority bondholders—I have forgotten their names—told me that he had investigated the facts, and that he considered Mr. Swanitz's statement, and that the trustees were bound to proceed, because the townsite belonged to the railroad company, and if they didn't proceed he would advise his client to take action against us. Then E. A. Shedd, of Shedd Bros. in Chicago, told me in the presence of his brother and Mr. Swanitz, that he [80] always understood the townsite was the property of the railway company, and that that was the reason why it was included in the loan, as security for the loan which he made, and if we didn't take any action he certainly would take action against the trustees. Subsequently, Mr. Mathews, Jr., partner of Mayer, Mayer, Atherton & Platt of Chicago, one of Chicago's principal law firms, told me, in discussing the matter, representing those same people, that he had investigated the facts on behalf of Shedd Bros.

(Testimony of W. J. Boland.)

and others, whom he represented, that he was satisfied that the townsite was the property of the Railway Company, and that Mr. Meyer was also satisfied, and if we didn't proceed, that we would have to answer for it later on. All this was before the action.

Q. Did you consider mentioning Mr. Bicknell, or not?

A. James Bicknell was general counsel of the Bankers Association. I had Mr. Patrick put all the facts before him, all the correspondence, and had Mr. Bicknell write him. I also told Mr. Bicknell what I have told you here of my investigation, what had been told me by Mr. Swanitz, what had been told me by Mr. West, and what had been told me by Mr. Patrick, who also told me that he had investigated all the facts, and that we could not fail to succeed, and Mr. Bicknell told me that in his opinion the railroad company was the owner of the property, at least, the townsite was the property of the railway company, and that he intended to write an opinion to the banks interested, and to tell them that action ought to be taken in the matter at once. He represented about 78 per cent of the bond holders. Mr. Bicknell told me this opinion on Friday, and on Monday I called his office up, and they said he was sick with a cold, and he was taken with pneumonia, and was buried the following Monday. He never was back in his office. Then subsequently, D. E. Thompson of Thompson, Dowdell & Johnson, of 85 Bay Street, Toronto, a man of many [81] years practice, came into it, representing the same interest that Mr. Bick-

(Testimony of W. J. Boland.)

nell represented. He went over the correspondence, had a chance to discuss it with Mr. Patrick when he was in Toronto, in December, 1914. I told him all the facts as I knew them, and he gave it to me as his opinion that undoubtedly we must succeed, and that the townsite was the property of the railway company. Further than that, when we were negotiating with the United States Government, J. P. Cotton, of Spooner & Cotton of 14 Wall Street, he discussed the facts, and went into it, and I told him what Mr. Christenson had represented to Mr. Swanitz, and had been passed on to him, and told him the other facts, and he said that undoubtedly that townsite was the property of the Railway Company.

Q. Did you, when this matter first came to your attention, immediately rush off into an action against Mr. Ballaine?

A. I certainly did not. I never heard of the claim in connection with the townsite, or knew anything about the facts, until sometime in the spring or summer of 1914, when I was in Washington, when Mr. Patrick first told them to me. They came to me as a revelation. I had never heard of them at all. I did everything that I possibly could do in order to get at all the facts. I interviewed Mr. Keeler—I don't remember whether it was before, or after the lawsuit. But I sent him the check and asked him to come to New York from Connecticut, where he was. I met him in the Waldorf-Astoria, where I was stopping. I showed Mr. Keeler a copy of the letter which I had been able to get from Colonel Swanitz, and he told me

(Testimony of W. J. Boland.)

then that he paid this money because he understood that the townsite was the property of the Alaska Central Railway, and that was the reason for paying it. Afterwards, when he was called as a witness, before he gave his evidence, he came up to my hotel— [82]

Mr. GRAVES.—I object to that. He has been over that.

WITNESS.—I want to explain what he said.

The COURT.—If it was before the suit was brought, all right. What he testified to afterwards is not.

WITNESS.—I want to explain that his evidence was in contradiction of his statement, and I wanted to state why—

The COURT.—The objection is sustained.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. What was your opinion as to the merits of the case on the advice which you got from counsel?

A. I gave it as my opinion on the case that undoubtedly this property was the property of the Railway Company, and I had a similar case in my office at the time, which had just been finished, at the privy council, the last court in our country, which had been decided in my favor, on my view, that the principle laid down, that a trustee, or director, acting for a company, could not acquire valuable property which was brought into existence by the company for his own use and benefit; that he had to account for it.

Mr. GRAVES.—If you are telling that to the jury, the Court will instruct them as to the law. We doubt

(Testimony of W. J. Boland.)

that that is the law of the United States.

Q. (Mr. BRONSON.) I ask whether or not, you thought you had a good case against Mr. Ballaine?

A. Undoubtedly.

Mr. GRAVES.—No objection to his answering that.

Q. (Mr. BRONSON.) Did you have any malice, or spite, or ill will against Mr. Ballaine?

A. Absolutely none.

Q. Have you ever had? A. None. [83]

Cross-examination.

Witness talked with Hanson in the fall of 1914. The witness could not remember whether he saw all the letters written by Swanitz to Patrick, admitted as exhibits to Patrick's deposition, or not, but he did see the final letter from Patrick to Mr. Stavert. He thought Hanson's opinion based on information he had himself collected. He did not ask him to give evidence at the trial because he did not think it necessary.

He talked with Mr. Butler in the spring of 1915 before the Alaska Northern suit was commenced. He did not call upon him to furnish evidence. The witness talked with Mr. Shedd several times but thinks he did not know that Keeler represented the Shedd's until after evidence in the suit was taken.

“Q. You knew that Mr. Shedd was furnishing the money up there at the time this money was paid to Mrs. Lowell; you knew that, didn't you?

A. I must have known it. I can't recall now.

Q. You investigated this case, didn't you?

(Testimony of W. J. Boland.)

A. Yes, sir.

Q. Did you rely on mere rumor, or did you look for facts? A. I looked for facts.

Q. Did you get facts? A. I thought I did.

Q. Did you produce any at the trial?

A. I thought so.

Q. The Court found you did not.

A. Well, the unfortunate part about it was that Mr. Swanitz, according to Mr. Shedd—

Q. I don't care for that.

A. Mr. Swanitz came to me—

Q. I didn't ask about Mr. Swanitz. [84]

A. If you will let me, I will tell the story.

The COURT.—Let him answer .

Mr. BRONSON.—We are going to insist on the same thing you insisted on yesterday, and that is, that he be allowed to finish his answer.

Mr. GRAVES.—He has stated that two or three times. If you wanted to say something against Mr. Swanitz, Mr. Swanitz is dead.

A. I know that, and that is the reason why I hesitate to talk.

Q. I didn't notice your hesitating before.

A. I did. Mr. Swanitz, in his evidence in Seward went back on all the statements that he made in the presence of Mr. Dowdell and myself, and in the presence of Mr. West and myself, and in the presence of Mr. Patrick and myself. I have no reason for thinking or believing that the statements Mr. Swanitz made to me prior to that trial, in the presence of those various people, were not absolutely true.

(Testimony of W. J. Boland.)

Q. As an attorney, of course you differentiate yourself as a witness. You made this statement awhile ago. What is the object of repeating it? When you say that you hesitate to say anything against Mr. Swanitz?

A. I am not saying anything against him.

Q. You made this statement twice. Let it rest. When I ask you a question do not refer to that again. Who is Mr. Mathews?"

The witness said that Mr. Mathews was the junior partner of Mayer, Mayer, Austin and Platt and that he discussed the matter with him in Chicago within three or four months before the action began. Mathews said he had investigated what the Shedd's had told him and was satisfied. Mathews did not furnish the witness any witnesses or documents.

"Q. You knew then that he was merely venturing an opinion?

A. Yes, sir, I suppose it was an opinion. [85]

Q. And as a business man, and as a lawyer, do you want to say to this jury that you acted upon the opinion of a man who knew nothing about the case?

A. But he did.

Q. He knew what?

A. He was representing certain bondholders, and told me that he had investigated the facts, and I took his word for it.

Q. Didn't you feel interested to know what facts he had in his possession?

A. I knew enough facts of my own, that if they

(Testimony of W. J. Boland.)

were substantiated on the trial, there could have been only one result.

Q. Then you were not controlled in your actions by anything that Mr. Mathews said?

A. It all helped.

Q. Did it help then, or when did it help?

A. Here were independent men representing various bondholders for whom they were acting, giving an opinion on it.

Q. Mr. Bicknell received this letter written in December, 1914, by Mr. Patrick, didn't he?

A. I don't know that.

Q. Well, it was after that that he expressed an opinion to you?

A. No, sir, Mr. Bicknell did not. Mr. Bicknell was dead in September of 1914.

Q. Mr. Bicknell was dead in September, 1914?

A. Yes, sir, he died early in September, about the middle of September, 1914.

Q. When did you talk with him last about it?

A. I don't remember when he died, but it was a day or so before he died that he and I discussed the matter. He told me he was going to write an opinion on it. He took sick on Saturday or Sunday, and never come back. [86]

Q. Who is Mr. Thompson?

A. Mr. Thompson is supposed to be one of Toronto's ablest attorneys; E. E. Thompson, or Thompson, Tilly & Johnson.

Q. Did Mr. Thompson furnish you with any evidence? A. No.

(Testimony of W. J. Boland.)

Q. Who is Mr. Cotton?

A. Mr. Cotton represented the United States Government at the taking over of this railroad.

Q. And he expressed to you an opinion?

A. We discussed the facts with him, because we were trying to get the Government to buy the land as well, and they would not do it, because they only wanted railroads, they said.

Q. To get them to buy the land as well?

A. Yes, sir.

Q. And Mr. Cotton expressed the view that it belonged to the railroad company?

A. We told him the facts. I told him the facts exactly as they were presented to me.

Q. As a matter of fact, what Mr. Cotton said to you was based upon what you said to him, was it not?

A. What I have told you here to-day, what Mr. Swanitz said, and what others said.

Q. What Mr. Patrick said.

A. What Mr. Patrick said, and the documents with the transaction, what Mr. Dowdell said about Mr. Ballaine's admissions in connection with the town-site.

Q. Were you in Washington City at the time of the hearing before the Senate Committee, and thereafter?

A. No, sir, I was not; I certainly was not. What time do you mean? I have been at some of the hearings.

Q. In 1913, before the Senate Committee?

(Testimony of W. J. Boland.)

Mr. BRONSON.—Are you taking up cross-examination now? [87]

Mr. GRAVES.—I am coming back to it.

Q. (Mr. GRAVES.) Were you there in 1913?

A. I don't think so; I don't think I was there that winter at all. I think Mr. Ballaine said that Mr. Jemmett and Mr. Patrick was there. I was not there; I am sure of it. I may have been there in July, 1913, Mr. Graves, but that was after the hearing; in fact, I think I was, because I recall something that happened.

Mr. GRAVES.—That is all.

WITNESS.—He was asking me about being in Washington in 1913; I wanted to correct that.

Mr. GRAVES.—If you don't remember being at the Senate Committee hearing, the hearing of the Senate Committee.

A. I was not at the Senate Committee, but I was in Washington in July, 1913. I want to say a word on this question of malice to show that there wasn't any malice. Mr. Ballaine came to me in 1913. At that time, I thought he owned the townsite. I had no information to the contrary. He wanted me to get our people to loan him \$25,000 on the security to help along on the work that he was doing in Alaska. I went back and recommended to them to loan him the money.

Q. That was in 1913?

A. That was in 1913. I had no knowledge then of the facts in connection with the townsite.

Mr. GRAVES.—That is all.

Mr. BRONSON.—The defense rests.

The COURT.—Has the plaintiff any further testimony?

Mr. GRAVES.—The plaintiff rests.

Renewal of Motion for Directed Verdict.

Mr. BRONSON.—If your Honor please, I wish at this time to renew [88] the motion I made to instruct the jury to render a verdict for the defendant in this case.

The COURT.—The motion is denied.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.”

Whereupon counsel argued the cause and the Court duly instructed the jury. No exceptions were taken.

Recital Relative to Verdict.

Thereupon the jury having received the charge of the Court retired to consider their verdict and shortly thereafter on, to wit, the 19th of September, 1918, returned a verdict in favor of the plaintiff, J. E. Ballaine, and against the defendant, W. J. Boland for the sum of \$30,000.00, and thereafter on, to wit, the 27th day of November, 1918, judgment was entered in accordance therewith and on January 6, 1919, in accordance with the rules of the above-entitled court, a petition for a new trial was duly filed, which was by order of the Court denied on January 21, 1919—such order providing that the defendant should have thirty days from the date thereof to prepare and file his bill of exceptions.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing, with the attached and before mentioned exhibits and depositions as his bill of exceptions and prays that the same may be settled, allowed, signed and certified by the trial judge.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

Received a copy of the foregoing proposed bill of exceptions with notice that the same would be lodged with the clerk of the above-entitled court this 20th day of February, 1919.

LYONS & ORTON,
Of Counsel for Plaintiff. [89]

[Indorsed]: Defendant's Proposed Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [90]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

This matter coming on regularly before me on the 10th day of July, 1919, the date designated by me for settling the bill of exceptions in this cause, and it appearing that the defendant within the time fixed by order entered January 21, 1919, had on February 20, 1919, lodged with the clerk of this court his proposed bill of exceptions, and that such amendments as have been thought necessary have been made by agreement of counsel;

NOW, THEREFORE, counsel for both parties being present and agreeing, approving and consenting; it is by the Court and the Judge of said court presiding at the trial of said cause

ORDERED and CERTIFIED that that certain bill of exceptions lodged with the clerk as aforesaid on the said 20th day of February, 1919, consisting of sixty-two typewritten pages, together with Plaintiff's Exhibits Nos. 1, 2, 3 and 4, and the original depositions of T. C. West and George H. Patrick, together with the exhibits attached to them, all of which are attached and made a part of the said bill, includes all of the material facts and evidence herein, and is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and the same being so settled and certified it is hereby ordered to [91] to be filed herein by the clerk.

EDWARD E. CUSHMAN,
Judge.

Received a copy of the foregoing order this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.

[Indorsed]: Order Settling Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [92]

[Title of Court and Cause.]

Assignments of Error.

Now comes the defendant W. J. Boland, by his attorneys, Bronson, Robinson & Jones, and says: That the judgment entered in the above cause on the 27th day of November, 1918, is erroneous and unjust and that the Court erred in entering its order on or about Jan. 22, 1919, denying the defendant a new trial, for the following reasons:

FIRST. The evidence was insufficient to support or justify the verdict returned in said cause on the 19th day of September, 1918, and upon which verdict the judgment is based; the said evidence being insufficient in that it did not justify a finding of:

1. Want of probable cause in instituting and maintaining the original suit.

2. Malice on the part of the plaintiff in instituting the original suit.

3. Legal damage to the plaintiff.

SECOND. The Court erred in refusing to grant defendant's challenge to the sufficiency of the evidence, and his motion to direct a verdict at the close of plaintiff's evidence.

THIRD. The Court erred in refusing to grant a motion for a directed verdict in favor of the defendant at the close of [93] all the evidence for the reasons given in the First Assignment and for the additional reason that the defendant had then affirmatively established the existence of probable cause by proving without rebuttal or contradiction

that the original suit was brought upon advice of counsel.

FOURTH. The Court erred in submitting the question of "want of probable cause" to the jury instead of deciding it as a matter of law.

FIFTH. The Court erred in not holding as a matter of law:

1. That the plaintiff had not shown want of probable cause."

2. That the defendant had affirmatively established probable cause in that he proved without rebuttal on contradiction that he had instituted the suit upon advice of counsel.

SIXTH. That there being no evidence showing a want of probable cause in instituting the suit, the Court erred in allowing the issue to become in substance: "Did the defendant maliciously and without probable cause keep the suit pending?" and in this connection grievously erred in allowing the admission of all of the evidence of the plaintiff on that issue while wholly excluding the evidence of the defendant, that is, in permitting the plaintiff to introduce evidence tending to show that the defendant acted in bad faith in not dismissing the original suit on account of knowledge which came to him after its institution, and at the same time excluding evidence offered by the defendant, to the contrary and tending to show that facts came to him after the institution of the suit which indicated that the suit was meritorious. The substance of the evidence admitted and excluded in this connection and the rulings made by the Court are as follows:

The plaintiff Ballaine testified over objection that the [94] defendant Boland heard one Keeler give a deposition after the institution of the original suit which should have convinced the defendant that the suit was not meritorious. The defendant was not allowed to rebut this or to testify as to what Keeler had told him in explanation and amplification of his testimony immediately after giving it, the Court ruling generally that the defendant could not offer evidence of any facts coming to his knowledge after the institution of the suit which appeared to show that the suit was meritorious.

The plaintiff Ballaine was also permitted over objection to testify that the defendant Boland was present when the bank books were examined and depositions taken tending to show that the \$4,000.00 paid for the land in dispute was ultimately paid by Ballaine and not out of railroad funds and that even then the defendant would not and did not dismiss the suit. Boland was not allowed to testify that at the same time and place Ballaine admitted that he as an officer of the Railway Company had at one time signed a prospectus gotten up to advertise the railway bonds, which prospectus stated that the town-site of Seward belonged to the railroad company, the Court ruling the evidence not admissible because the knowledge came to Boland after the institution of the suit.

SEVENTH. The Court erred in the admission of evidence of damage in that it departed from the true rule in such cases that damages, if any, can only be recovered with respect to actual sales prevented and

specifically pleaded and proved. The plaintiff was erroneously permitted to testify that he owned about six hundred lots and that their sale price was depreciated about fifty per cent. He was permitted to estimate and state values from the prospective prices stated in options he had given when it was announced that Seward would be the terminus [95] of the Government railroad. He had given no contracts at these prices, only options. The only optionees named were business houses, who, as the plaintiff admitted, never did establish branches in Seward. The foregoing is the substance of the loose testimony upon which the jury was erroneously allowed to speculate and upon which it must of necessity have based at least \$22,000.00 of its verdict.

EIGHTH: The Court erred in allowing the plaintiff Ballaine to testify that he had incurred the enmity of Patrick, one of the attorneys who advised the defendant to bring the original suit, and that Patrick threatened to retaliate. This evidence was offered as plaintiff's counsel stated on the theory that it tended to prove defendant's malice.

NINTH. The Court erred in refusing to strike the evidence as to Patrick's threat, at the close of plaintiff's evidence, it not having been shown that the defendant had any knowledge of it.

TENTH. The Court erred in denying defendant's motion for a new trial which specifically pointed out all of the foregoing errors and was duly filed within forty-two days after judgment as by rule provided.

WHEREFORE, the defendant prays that the said judgment be reversed and the District Court directed to dismiss the said action as prayed in the answer herein, or, in the alternative, to grant a new trial thereof.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

Received a copy of the foregoing Assignments of Error this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON

Attorneys for Plaintiff. [96]

[Indorsed]: Assignments of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [97]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

The said defendant, W. J. Boland, feeling himself aggrieved by the judgment entered in said cause on November 27, 1918, in favor of said plaintiff and against said defendant for the sum of \$30,000.00, and plaintiff's costs and disbursements, which judgment became final by entry of an order denying defendant's motion for a new trial on January 21st, 1919, and in which judgment and the proceeding leading up to the same certain errors were committed to the prejudice of said defendant, which more fully appears from the assignment of errors filed herewith,

comes now and prays said Court for an order allowing the defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of under, and according to the laws of the United States in that behalf made and provided, and also prays that the Court in said order fix the amount of security which the defendant shall give for the plaintiff's costs, and further, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated this 10th day of July, 1919.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant. [98]

Copy of the foregoing petition for order allowing writ of error received, and due service acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and

LYONS & ORTON

Attorneys for Plaintiff.

[Indorsed]: Petition for Order Allowing Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [99]

[Title of Court and Cause.]

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the defendant, W. J. Boland, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth District, together with an assignment of errors also filed in due time; and also praying that a transcript of the record duly authenticated may be sent to said court in order that said alleged errors may be examined.

The Court having duly considered the same does hereby allow the writ of error and grants the several *prays* of said petition on condition that the defendant furnish a surety bond to secure plaintiff's costs in the sum of \$500.00.

Dated this 10th day of July, 1919.

EDWARD E. CUSHMAN,
Judge.

Received a copy of foregoing order this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON
Attorneys for Plaintiff.

[Indorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [100]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that, we, W. J. Boland, the defendant above named, and United States Fidelity & Guaranty Company, a Maryland corporation, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto John E. Balaïne the plaintiff above named, in the sum of Five Hundred Dollars, to be paid to the plaintiff, his executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated and executed this 10th day of July, 1919.

The condition of this obligation is such that whereas the said defendant has obtained from the above-entitled court a writ of error to reverse the judgment in said action, and a citation is about to be issued citing and admonishing the plaintiff to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, if the said defendant W. J. Boland shall prosecute the said writ of error and pay or cause to be paid all costs that may be awarded against him in said proceedings, then this obligation shall be void, otherwise it shall remain [101] in full force and effect.

W. J. BOLAND,
By BRONSON, ROBINSON & JONES,
His Attorneys.

UNITED STATES FIDELITY AND
GUARANTY CO.

By JOHN C. McCOLLISTER,

Attorney in Fact.

[Seal of U. S. F. & G. Co.]

The sufficiency of the surety on the foregoing bond is approved this 10th day of July, 1919.

EDWARD E. CUSHMAN,

Judge of said Court.

Copy of foregoing bond received, and due service acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and

LYONS & ORTON,

Attorneys for Plaintiff.

[Indorsed]: Appeal Bond. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[102]

[Title of Court and Cause.]

Writ of Error (Copy).

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between John E. Ballaine, plaintiff, and W. J.

Boland et al., defendants, a manifest error hath happened, to the great damage of the said W. J. Boland, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of August, 1919, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESSES, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand nine hundred and [103] nineteen, and of the Independence of the United States the one hundred and forty-third.

[Seal] F. M. HARSHBERGER,
Clerk of said District Court of the United States, for
the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington.

Copy of within writ of error received and due service of the same acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.

[Indorsed]: Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.
[104]

[Title of Court and Cause.]

Citation on Writ of Error (Copy).

United States of America,—ss.

To John E. Ballaine, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the ninth day of August, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein W. J. Boland is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should

not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 10th day of July, 1919.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Attest: _____,
Clerk of said United States District Court for the Western District of Washington.

_____,
Deputy. [105]

We hereby, this 10th day of July, 1919, acknowledge service of the foregoing Citation at the city of Seattle, Washington.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for John E. Ballaine.

Received a copy of the foregoing citation lodged with me for defendant in error this 10th day of July, 1919.

_____,
Clerk of said United States District Court.

[Indorsed]: Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [106]

[Title of Court and Cause.]

**Stipulation Relating to Exhibits and Depositions on
Appeal.**

It is herewith stipulated, subject to the order of the Court, that the clerk of this court in making up his return to the writ of error herein shall include therein and as part thereof the originals instead of copies of the following matters heretofore attached to and by an order of Court, made a part of the bill of exceptions.

Plaintiff's Exhibits 1, 2, 3 and 4.

Deposition of T. C. West.

Deposition of George H. Patrick, with exhibits thereto.

Dated December 1, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

[Indorsed]: Stipulation Relating to Exhibits and Depositions on Appeal. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[107]

[Title of Court and Cause.]

**Order for Sending Up Original Exhibits and
Depositions.**

Pursuant to written stipulation of the parties, this day made and filed, and it being the opinion of the Court that such procedure is desirable and proper,—

IT IS ORDERED that the clerk of this court shall, in making up his return to the writ of error in this cause, send to the United States Circuit Court of Appeals for the Ninth Circuit the original exhibits and depositions in said stipulation mentioned.

Dated at Seattle, Washington, this first day of December, 1919.

EDWARD E. CUSHMAN,
Judge of the Above-entitled Court.

[Indorsed]: Order for Sending Up Originals. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [108]

[Title of Court and Cause.]

Stipulation as to Printing Record.

To avoid unnecessary repetition and expense, IT IS HEREBY STIPULATED, that in printing transcript of record in the above-entitled cause, there shall be omitted from the pleading, orders and other papers (other than the stipulation relative to the pleadings, the amended complaint, answer and judg-

ment, and the depositions of West and Patrick), the title of the court, and the number and title of the cause.

IT IS FURTHER STIPULATED that in printing the depositions of T. C. West and George H. Patrick, the stipulations for the taking of the same, and the commissions issued for the taking of the same, shall be omitted.

IT IS FURTHER STIPULATED that in lieu of printing the copies of enclosures attached to Exhibit 13 of the deposition of George H. Patrick and scheduled as such in said exhibit, the clerk of the Circuit Court of Appeals in preparing the record for printing may insert a note stating in substance that said enclosures referred to are omitted for the reason that they are copies of exhibits already printed, that is, of Exhibits 1, 2, 3, 4, 5 and 7 of the said deposition.

Dated this first day of December, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant. [109]

[Indorsed]: Stipulation as to Printing Record. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [110]

[Title of Court and Cause.]

Stipulation as to Record and Praecipe for Transcript.

IT IS HEREBY STIPULATED between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein copies, as hereinafter specified, of the following papers and no others:

Stipulation as to pleadings made September 17, 1918, and filed November 26, 1918.

Amended and supplemental complaint, filed September 18, 1918.

Answer of W. J. Boland, filed on July 25, 1916.

Judgment, filed on November 27, 1918.

Petition for new trial, filed on January 6, 1919.

Order denying petition for new trial made January 21, 1919.

Bill of exceptions lodged on February 20, 1919, originals, Plaintiff's Exhibits 1, 2, 3 and 4, and the original depositions of T. C. West and George H. Patrick not to be in typewritten record but to be sent down separately, as provided in stipulation and order of December 1, 1919.

Order settling bill of exceptions.

Assignments of error.

Petition for order allowing writ of error.

Order granting writ of error and fixing amount of cost bond.

Bond.

Writ of error.

Copy of writ of error lodged with clerk.

Original citation and acceptance of service thereof.

Copy of citation lodged with clerk. [111]

Stipulation as to exhibits and depositions.

Order as to sending up originals.

Stipulation as to record and praecipe for transcript.

Stipulation as to printing record; which comprises all papers, exhibits, depositions, etc., necessary to hearing the said cause on writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, provided, however, that either party may supplement the record in accordance with the rules of court by adding thereto any matter of record not hereinbefore mentioned.

Dated December 1, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

To the Clerk of the Above-entitled Court:

Please prepare at our expense Transcript of Record in accordance with the foregoing stipulation.

BRONSON, ROBINSON & JONES.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

[Endorsed]: Stipulation as to Record and Praecipe for Transcript. Filed in the United States District Court, Western District of Washington, North-

ern Division. Dec. 1, 1919. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [112]

[Title of Court and Cause.]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages, numbered from 1 to 112, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [113]

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 270 folios at 15c\$40.50
 Certificate of Clerk to transcript of record—
 4 folios at 15c..... .60
 Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record amounting to \$41.30, has been paid to me by counsel for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original Citation issued in this cause.

In Witness Whereof I have hereto set my hand and affixed the seal of said District Court of Seattle, in said District, this 2d day of December, 1919.

[Seal] F. M. HARSHBERGER,
 Clerk United States Circuit Court. [114]

Writ of Error (Original).

[Title of Court and Cause.]

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between John E. Ballaine, plaintiff, and W. J. Boland et al., defendants, a manifest error hath happened, to the great damage of the said W. J. Boland, as is

said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the ninth day of August, 1919, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand nine hundred and [115] nineteen, and of the Independence of the United States the one hundred and forty-third.

[Seal] F. M. HARSHBERGER,
Clerk of said District Court of the United States, for
the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge, for the Western Dis-
trict of Washington.

Copy of within writ of error received and due service of the same acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,

Attorneys for Plaintiff. [116]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [117]

[Title of Court and Cause.]

Citation on Writ of Error (Original).

United States of America,—ss.

To John E. Ballaine, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the ninth day of August, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein W. J. Boland is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 10th day of July, 1919.

EDWARD E. CUSHMAN,
United States District Judge, for the Western Dis-
trict of Washington.

Attest: _____,
Clerk of said United States District Court for the
Western District of Washington.

_____,
Deputy. [118]

We hereby, this 10th day of July, 1919, acknowl-
edge service of the foregoing Citation at the city of
Seattle, Washington.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for John E. Ballaine.

Received a copy of the foregoing Citation lodged
with me for defendant in error this 10th day of July,
1919.

_____,
Clerk of said United States District Court. [119]

[Endorsed]: No. ——. In the District Court of
the United States for the Western District of Wash-
ington, Northern Division. Filed in the United
States District Court, Western District of Washing-
ton, Northern Division. Jul. 10, 1919. F. M. Harsh-
berger, Clerk. By S. E. Leitch, Deputy. [120]

[Endorsed]: No. 3421. United States Circuit
Court of Appeals for the Ninth Circuit. W. J.
Boland, Plaintiff in Error, vs. J. E. Ballaine, De-

pendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 5, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Title of Court and Cause.]

**Stipulation Extending Time to File Record in
Appellate Court.**

The undersigned, attorneys for both parties in the above-entitled cause, respectively represent to the Court:

That a writ of error has been sued out in said cause directed to the District Court of the United States for the Western District of Washington, Northern Division, said writ being returnable on the ninth day of August, 1919;

That the record in said cause is very voluminous, and will require a great amount of time to prepare, and the preparation thereof will entail a large expense;

That it is believed by the attorneys for both parties that the cause may be compromised and settled if sufficient time be had for the purpose, it being necessary to consult with parties resident in Toronto, Canada, some of whom are reputed to be abroad:

WHEREFORE, IT IS STIPULATED that if the Court will permit that the time for filing the record in the above-entitled court may be extended one hundred twenty (120) days, and we herewith petition the Court to make an order so extending the time, or, if in the judgment of the Court the extension is too great, to extend the time for some lesser period.

Seattle, Washington, July 28, 1919.

IRA BRONSON,

J. S. ROBINSON,

H. B. JONES,

Attorneys for Plaintiff in Error.

CARROLL B. GRAVES and

LYONS & ORTON,

Attorneys for Defendant in Error.

[Endorsed]: No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 31, 1919. F. D. Monckton, Clerk. Refiled Dec. 5, 1919. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Order Enlarging Time to File Record in Appellate Court.

Upon the petition and stipulation of the above-named parties to the above-entitled cause, duly exhibited to this Court, and for good cause shown,—

IT IS ORDERED that the time provided by the rules in which the plaintiff in error shall file the record of the cause in this court shall be extended a

period of one hundred twenty (120) days from the ninth day of August, 1919.

Signed this 31st day of July, 1919.

HUNT,
United States Circuit Judge.

[Endorsed]: No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 31, 1919. F. D. Monckton, Clerk. Refiled Dec. 5, 1919. F. D. Monckton, Clerk.

*In the District Court of the United States for the
Western District of Washington.*

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. K. BOLAND et al.,

Defendants.

Deposition of T. C. West on Behalf of Defendants.

*In the District Court of the United States for the
Western District of Washington.*

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND et al.,

Defendants.

(Deposition of T. C. West.)

BE IT REMEMBERED that on the twenty-second day of January, 1917, at 11 o'clock A. M., under and pursuant to the Commission to me issued by the Honorable Jeremiah Neterer, Judge of the above-entitled court and in the above-entitled cause, upon stipulation by counsel for the plaintiff and defendants, I attended at the time and place named therein, and at the request of the defendants, there being no objection or appearance on behalf of the plaintiff, adjourned the taking of said deposition until the hour of 11 o'clock A. M. on January 27th, 1917, at the office of Mr. T. C. West, 1170 Phelan Building, Market Street, San Francisco. And now at the hour of 11 o'clock A. M., January 27th, 1917, at the said office of said T. C. West, under and pursuant to said Commission, the following proceedings were had. There being Ira Bronson, Esq., upon behalf of the defendants; no appearance being made on behalf of the plaintiff.

Mr. T. C. WEST, a witness on the part of the defendants, duly sworn, testified as follows:

Direct Examination.

(By IRA BRONSON, Esq.)

Q. Will you please state your name, residence and profession?

A. T. C. West; residence, 1204 Walnut Street, Alameda, California; my office address, No. 1170 Phelan Building, San Francisco; I am an attorney at law.

(Deposition of T. C. West.)

Q. How long have you been a practicing attorney at law?

A. For almost twenty-six years; not altogether in the United States, for about seventeen years in California, previously in Canada.

Q. Are you acquainted, Mr. West, with the parties plaintiff and defendants in the action entitled *J. E. Ballaine, Plaintiff, vs. W. J. Boland, F. G. Jemmett and J. E. Stavert*, now pending in the District Court of the United States of the Ninth Judicial Circuit for the Western District of Washington, Northern Division?

A. I know them all personally, except Mr. Stavert.

Q. Were you acquainted with the parties to an action brought in the United States District Court of the Territory of Alaska, Third Division, entitled *The Alaska Northern Railway Company vs. J. E. Ballaine and Frank L. Ballaine and the Alaska Central Railroad*? A. Yes.

Q. Were you one of the attorneys for the plaintiff in that case? A. Yes.

Q. Were you acquainted, during his lifetime, with Colonel Swanitz? A. Yes.

Q. Mr. West, will you go on and state in your own way, your connection with and your acquaintance with the facts and the witnesses in that matter prior to the institution of the action, and what advice and counsel you gave to the defendants in this action and particularly to Mr. W. J. Boland with reference to the bringing of the former action?

A. I had known Colonel Swanitz for probably a

(Deposition of T. C. West.)

couple of years before the action was commenced. Mr. Boland, I had known personally for quite a long time before the action, and I believe I formerly knew him a great many years ago in Toronto. Mr. Jemmett, I had met once in Washington. The matter of bringing the action against the Ballaines was discussed very fully by Mr. Boland and myself and Colonel Swanitz, and I also consulted in this action with Mr. Patrick, an attorney in Washington, D. C. All the data necessary for the action was gathered during a period covering about a year, and I constantly urged the bringing of the action, but nothing was definitely settled as to its actual commencement until Mr. Boland came to San Francisco from Toronto to consult with me. Mr. Boland and I thereupon prepared the complaint and cabled it to Valdez, Alaska, to my agents there, Messrs. Donohoe & Dimond. The reason for cabling was, that there was some question as to whether or not the statute of limitations would run against the cause of action in case the suit was not started immediately after Mr. Boland arrived here.

Q. Will you state who Colonel Swanitz was with reference to any prior matters or business of the Alaska Northern or the Alaska Central Railroad?

A. Colonel Swanitz had formerly been the chief engineer for the Alaska Central Railway and was interested also in the Tanana Construction Company and in the Tanana Railway Construction Company. I understood from him that he had previously had access to the books, papers and documents of the

(Deposition of T. C. West.)

Alaska Central and the Construction Company mentioned, and from my frequent consultations with him believed and still believe that he knew all of the facts upon which we relied for the success of the action. His familiarity with it, correspondence and papers which I afterwards had occasion to examine, convinced me of his thorough knowledge of the matters that would arise in the course of the trial.

Q. Mr. West, Colonel Swanitz was afterwards a witness for the plaintiff in that action, was he not?

A. Yes.

Q. State whether or not his evidence as given upon the witness-stand in the case agreed with substantially what he had told you his evidence would be in your interviews with him prior to bringing the action. A. No, it did not.

Q. Just state in your own way, if you will, whether the discrepancy was of a serious character or would produce good or bad effect upon the plaintiff's case in that case.

A. Yes, the difference in the story told on the witness-stand and that told to Mr. Boland in my presence and to me personally on many occasions, was very great and in one respect very vital to the interests of the plaintiff. As an illustration, both Mr. Boland, Mr. Patrick and myself were always informed by Colonel Swanitz that the directors and officers, including himself, of the Alaska Central Railway Company and of the Construction Company mentioned, had always understood, and it was a matter of general knowledge to them that the Ballaines

(Deposition of T. C. West.)

held the townsite of Seward for and on behalf of the Alaska Central Railway.

Q. Was the Alaska Central Railway Company the predecessor in interest of the Alaska Northern Railway Company, the plaintiff in the former action?

A. Yes.

Q. Were Ballaines, or either of them, members of the Directorate of the Alaska Central Railway Company?

A. John E. Ballaine was and I believe Frank Ballaine was also.

Q. Did you advise Mr. Boland whether or not in your opinion the Alaska Northern Railway Company had a good cause of action against the defendants Ballaine in that case to the recovery of the townsite which was the subject of the action subsequently brought?

A. Yes, I so advised them and still believe that action ought to have prevailed.

Q. Did you advise them, Mr. West, and do you know whether or not Mr. Patrick advised them, or if you do not know as to him, did you advise them yourself as to what was the duty of Mr. Boland, Mr. Stavert and Mr. Jemmett as trustees with reference to bringing such suit?

A. Yes, I advised Mr. Boland that it was his duty to bring the action in order to protect those for whom he and Jemmett and Stavert were trustees, and I understood from Mr. Patrick that he also had advised them to the same effect.

Q. Mr. Patrick is a practicing attorney at law in

(Deposition of T. C. West.)

Washington, D. C., is he not?

A. Yes; of a great many years' experience, and Mr. Patrick was thoroughly familiar with all of the details of the Alaska Central and Alaska Northern, in fact more familiar with them than any of us.

Q. What conversation did you have with Colonel Swanitz at any time prior to the bringing of this former action with reference to Mr. Ballaine's relationship to the townsite?

A. I had a great many conversations with Colonel Swanitz, and in all of them where the matter was discussed, he informed me that John E. Ballaine never claimed to own the townsite personally, but that he always acknowledged that he was holding it for and on behalf of the Alaska Central Railway Company, and the first time I ever heard Colonel Swanitz say anything to the contrary was when interrogated on that subject at the trial of the action.

Q. And what was his evidence then?

A. When he stated that John E. Ballaine always claimed to own the townsite, which came to me as a complete surprise.

T. C. WEST.

United States of America,

State of California,

City and County of San Francisco,—ss.

I, James Mason, a notary public in and for the city and county of San Francisco, State of California, and Commissioner named in the commission hereto annexed, DO HEREBY CERTIFY that on the 27th day of January, 1917, at 11 o'clock A. M.,

upon request of counsel for defendants, there being no objection from or appearance on behalf of the plaintiff, at the city of San Francisco, in the county of San Francisco, and State of California, I was attended by Ira Bronson, Esq., counsel for defendants, no appearance being made on behalf of the plaintiff, and the said witness, who was of sound mind and lawful age, having been by me first carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the within-entitled cause, gave his testimony, which by consent of counsel for the defendant was taken down by a stenographer appointed by me for that purpose, in the presence of the witness and from his statements, and the said stenographic notes were afterwards reduced to writing by a typewriter, and the signature of the witness to the same being subscribed in my presence.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said commission named, nor in any way interested in the event of the cause named therein.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal this 9th day of February, A. D. 1917.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San
Francisco, State of California, Commissioner.

My commission will expire December 4th, 1919.

[Endorsements on envelope containing Deposition of T. C. West]: Addressed to Frank L. Crosby, Esq.,

Clerk of the District Court of the United States for the Western District of Washington, Seattle, Wash. From James Mason, Notary Public, 430 California St., San Francisco.

Filed in the United States District Court, Western District of Washington, Northern Division. February 13, 1917. Frank L. Crosby, Clerk. By _____, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed December 5, 1919. F. D. Monckton, Clerk.

Published order open court, Sept. 18th.

In the District Court of the United States for the Western District of Washington, Northern Division.

Number 3122.

J. E. BALLAINE,

Plaintiff,

versus.

W. J. BOLAND et al.,

Defendants.

Deposition of George H. Patrick on Behalf of Defendant.

Deposition of George H. Patrick, taken before me, Alexander H. Galt, a notary public in and for the District of Columbia, at Room 209, The Southern Building, 15th and H Streets, Northwest, in the city of Washington, D. C., Tuesday, March 6th, 1917,

(Deposition of George H. Patrick.)

pursuant to the annexed Stipulation and Commission to take deposition in the above-entitled cause.

APPEARANCES:

No appearance for Plaintiff.

Mr. W. J. BOLAND, for Defendants.

GEORGE H. PATRICK, a witness of lawful age, being by me first duly sworn, testified as follows: (Examined by Mr. W. J. BOLAND.)

Q. Mr. Patrick, will you please state your name, residence and profession.

A. My name is George H. Patrick; residence, Montgomery, Alabama; I am a lawyer, have been in the practice about fifty years and I have been practicing in the city of Washington for the last twenty years.

Q. Are you acquainted with the parties plaintiff and defendant in the action entitled J. E. Ballaine, Plaintiff, versus W. J. Boland, F. G. Jemmett and W. E. Stavert, now pending in the District Court of the United States, of the Ninth Judicial District for the Western District of Washington, Northern Division? A. I am.

Q. Were you acquainted with the parties to an action brought in the United States District Court of the Territory of Alaska, Third Division, entitled Alaska Northern Railway Company versus J. E. and Frank L. Ballaine and the Alaskan Central Railroad? A. I was.

Q. Did you know Col. A. W. Swanitz in his lifetime? A. I did.

Q. How long had you known Col. Swanitz?

(Deposition of George H. Patrick.)

A. Since about 1910, certainly as early as that.

Q. Who was Col. Swanitz, having regard to the Alaska Northern and the Alaska Central Railways?

A. He was chief engineer of the Alaska Central and of the Alaska Northern Railway Companies.

Q. Will you go on and state in your own way your connection with and your acquaintance with the facts and the witnesses in that action of the Alaska Northern Railway Company against the Ballaines and the Alaska Central Railway prior to the institution of the action and what advice you gave to the defendants in this present action, particularly to W. J. Boland and W. E. Stavert with reference to the bringing of the former action?

A. I was the attorney,—called the General Attorney—of the Alaska Northern Railway Company from January, 1910, the date of its organization, until that railway was sold to the Government of the United States. I was located in Washington all the time in correspondence with all the officials of the company wherever they were located, constantly receiving inquiries for advice and instructions, which I gave, as well as attending to whatever matters the company might have in Washington. I knew Col. Swanitz very well, received a great many communications from him, and my first information of any ground for a suit by the company for the recovery of the Seward Townsite came from him in a letter written by him to United States Senator Chamberlain, bearing date June 2, 1913, which I received a few days later from Col. Swanitz. Reference was

(Deposition of George H. Patrick.)

made therein to the townsite, and I at once inquired of him concerning it. I received a considerable number of letters from him bearing on the subject and I wrote a number to him, and I had several conversations personally with him about the matter here in Washington.

Q. Then you produce, and I ask to have it marked as Exhibit 1, a copy of a letter from A. W. Swanitz to Hon. Geo. E. Chamberlain, dated June 2d, 1913. That copy of the letter was received by you through the mails from Col. Swanitz, was it? A. Yes.

Q. Then you also produce, Mr. Patrick, certain original letters from Col. Swanitz to you, dated July 3d and two letters dated July 30, 1913; one of August 17, 1913; one of January 15, 1914; one of February 11, 1914; one of February 14, 1914; one of September 10, 1914, and one of November 3, 1914, and which I ask to have marked as exhibits here Numbers 2 to 10, inclusive, for the purpose of this examination.

Those letters are produced from your files, are they, Mr. Patrick? A. Yes, sir.

Q. You know Col. Swanitz' handwriting and his signature, do you? A. I do.

Q. All those letters, I believe, but one, are written in his own hand?

A. All are in his own handwriting except one in typewriting, but that is signed with his signature, and to which is attached a footnote in his own handwriting.

(Deposition of George H. Patrick.)

Q. You also produce a copy of a letter from E. R. Keeler, attached to Col. Swanitz' letter of February 11, 1914, Exhibit 7. That is a copy of a letter in Col. Swanitz' handwriting purporting to be a copy of a letter from E. R. Keeler to John E. Ballaine, dated September 23, 1904. That is correct, is it, Mr. Patrick?

A. Yes, it is addressed to Jno. E. Ballaine, President. That copy is in Col. Swanitz' handwriting.

Q. All those letters, I believe, contain statements and facts relating to the townsite of Seward and the question involved in the action as to the ownership of that townsite? A. Yes, sir.

Q. As a result of these letters will you tell me what you did and what advice you gave to Boland, Stavert and Jemmett, or either of them?

A. I advised them that in my judgment the facts communicated to me showed that the Seward Townsite had been purchased with money belonging to the Alaska Central Railway Company, or the construction company, which was the same thing; that Ballaine constituted himself a trustee holding for the company and that the title and possession of the townsite could and should be recovered to the Railway Company and be made a part of its assets. I also advised them, at least I advised Messrs. Stavert and Boland—I am not sure as to Mr. Jemmett, although I believe I did tell him the same thing—that in case action should not be brought by them they might be held liable for not having faithfully col-

(Deposition of George H. Patrick.)

lected and turned into the treasury of the Company one of its most valuable assets.

Q. Did you know what the relationship was existing between the townsite company, the railway and Jemmett, Stavert and Boland? A. I did know.

Q. Will you state what your knowledge was, or what you were told of their relationship to the company and to the Alaska Northern Railway?

A. I had been told that they were trustees, if not nominal at least actual trustees, perhaps under the name of the committee for the bondholders of the Alaska Central Railway Company, which purchased at marshal's sale all the assets of that company. I had seen the documents which constituted them such trustees; I knew of the deposit of bonds and receipts given by them, and I knew from them and from the bondholders and from the conveyance made that they had transferred the assets of the Alaska Central Railway Company to the Alaska Northern Railway Company, which was organized to purchase them and to operate the road, and which did purchase and operate it.

Q. Did you know who was president of the Alaska Northern Railway Company? A. I did.

Q. Who was president?

A. From the time that I first heard of the claim to the townsite, as before stated, William E. Stavert was the president.

Q. That is, William E. Stavert, one of the defendants in this action?

A. Yes, one of the defendants in. this action.

(Deposition of George H. Patrick.)

Q. Did you know who was treasurer of the Alaska Northern Railway Company?

A. F. G. Jemmett was the treasurer.

Q. And he is also one of the defendants in this action? A. He is also one of the defendants.

Q. Did you know a firm, or two gentlemen by the name of Shedd in Chicago?

A. I knew of the firm and I knew Mr. C. B. Shedd personally.

Q. Did you know how they were interested in the Alaska Northern Railway Company?

A. Yes, as bondholders.

Q. Did you ever have any discussion with them, or with any one representing them, on the question of the townsite of Seward, which was the subject of the suit of the Alaska Northern Railway Company against Ballaine?

A. I am not sure that that was ever the subject of discussion between Mr. Shedd and myself. My impression is that we did not discuss it. I have seen some of Mr. Shedd's letters on the subject in the hands of Col. Swanitz, and Col. Swanitz related to me something of his conversation with them on the subject.

Q. Did he tell you of any action, or proposed action, which the Shedd's intended to take, either in connection with the townsite or subsequently against the trustees? A. He did.

Q. What did he tell you?

A. Col. Swanitz told me that the Shedd Brothers, as holders of bonds, would almost certainly, and they expected to proceed against the trustees to hold them

(Deposition of George H. Patrick.)

for any deficiency in, the amount they might receive in the distribution of the proceeds for the railroad if it should appear that suit ought to have been brought or that suit might have been brought with reasonable chance of success.

Q. Did he make any statement as to what their claim was so far as the Townsite of Seward was concerned?

A. Yes; that their claim was that as part owners of the Alaska Northern Railway Company the right, title and interest that that company had in Seward was something to which they might and should look for the satisfaction of their bonds.

Q. Do you know the firm of Bicknell, Bain, Macdonell & Gordon, solicitors at Toronto, Canada?

A. I know them by reputation and I have had correspondence with them.

Q. Did you know who they represented in connection with the Alaska Northern Railway Company or the Alaska Syndicate, managed by the defendants?

A. I knew from you and I think I knew from them and otherwise, from others connected with the matters in Canada, that they represented certain banks in Canada which had taken over the assets of the Sovereign Bank of Canada, which was the very large majority owner of the Alaska Central Railway securities and also of the road after the sale.

Q. Did you have any correspondence with Bicknell, Bain, Macdonell & Gordon? A. I did.

Q. Having special reference to the townsite of Seward?

A. I did. They wrote to me several letters, which

(Deposition of George H. Patrick.)

I answered, and they wrote to me in the capacity I have mentioned.

Q. And you produce from your files three carbon copies of letters from you to Bicknell, Bain, Macdonell & Gordon, of what dates, please?

A. September 12, 15 and 16th, 1914.

Q. And there are certain copies of letters attached to the letter of September 16, 1916?

A. I can and do produce carbon copies of the letters.

Q. When were these carbon copies made?

A. They were made on the respective days they bear date.

Q. At the same time as the originals?

A. At the same time as the originals.

Q. What happened to the originals?

A. The originals were duly mailed to that firm.

Q. On or about their respective dates?

A. On the days they bear date.

Q. I will ask to have those carbon copies marked as exhibits 11, 12 and 13 for this record. Those carbon copies are produced from your files in your office, are they? A. From my files in my office.

Q. Mr. Patrick, you have had certain correspondence with Mr. Stavert, have you not? A. Yes, sir.

Q. Have you got carbon copies of certain letters which you mailed to him? A. I have.

Q. Will you produce them, please?

A. I have a carbon copy of my letter to Mr. Stavert bearing date December 5, 1914, which I now produce.

Q. When was that carbon copy made?

A. At the same time that the original was made.

(Deposition of George H. Patrick.)

Q. And what happened to the original?

A. The original was duly mailed to Mr. Stavert in Canada.

Q. I will ask to have that marked as exhibit 14 for this record.

Did you have any doubt about the statements contained in Col. Swanitz' letters and in his interviews with you, I mean as to the correctness or reliability of what he stated?

A. None whatever. Everything that he stated to me that I had opportunity to investigate was amply confirmed.

Q. And as a result of the conversations and the correspondence which you had an opportunity to examine, what was your opinion as to the result of an action that might be brought to recover that townsite?

A. It was my opinion that the action must certainly result in, the recovery of the townsite, and I so advised Mr. Stavert, the president, Mr. Boland, Mr. Bicknell's firm, Mr. Jemmett and also Mr. G. T. Clarkson, who represented the Canadian banks, for whom Bicknell, Bain, Macdonell & Gordon appeared as counsel.

Q. Is there anything more you want to add to what you have already stated, Mr. Patrick?

A. I do not know that there is. I never had any doubt whatever of the fact that Col. Swanitz, by his own evidence and the documents he had and asserted his ability to get and the evidence of other witnesses he repeated to me would establish clearly the right of

(Deposition of George H. Patrick.)

the railroad company to this townsite. Col. Swanitz was extremely earnest in his assertions of what proof could be made to sustain this contention. He brought Mr. Thomas C. West, of San Francisco, here to consult with me about the case, to go over the facts and the law bearing upon them with him, and he was present at Mr. West's and my interviews, confirming whatever I quoted as coming from him.

Q. You also had rather strong views as to the duties and obligations of the trustees and as to the responsibility that would be imposed on them in case action were not commenced?

A. I had. I had good reason, as I thought, to fear that action would almost certainly be taken against them if they did not bring the suit, and I advised Mr. Stavert and Mr. Boland, I know, that I thought it might be necessary for their own self-protection to bring the suit, even if they failed to maintain it, under all the circumstance.

Q. But you never had any doubt of the result if the evidence could have been obtained according to Col. Swanitz' statements? A. I had not.

And further deponent sayeth not.

GEORGE H. PATRICK.

Subscribed and sworn to before me this sixth day of March, 1917.

[Seal]

ALEXANDER H. GALT,
Notary Public in and for the District of Columbia,
and Commissioner.

I, Alexander H. Galt, notary public in and for the District of Columbia, the commissioner designated in

the attached commission and stipulation, certify that at the time and place aforesaid, George H. Patrick, a witness on behalf of the defendants in the above-entitled cause, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the said cause; and that his answers were taken down in my presence, and his deposition as above set forth was read over to and signed by him, before me, at the time and place aforesaid. I further certify that I have no office connection or business employment of any kind with any of the parties to this suit or with their attorneys; and that I am not in any way interested, either directly or indirectly, in the result of said suit.

In witness whereof I have hereunto set my hand and official seal this 6th day of March, 1917.

[Seal]

ALEXANDER H. GALT,

Notary Public and Commissioner.

Notary fee, \$25.00. Pd. by W. J. Boland.

**Exhibit No. 1 to Deposition of George H. Patrick—
Letter, June 2, 1913, Swanitz to Chamberlain.**

A. W. SWANITZ,

Chief Engineer and Manager.

ALASKA NORTHERN RAILWAY CO.

Seward, Alaska, June 2nd., 1913.

Hon. Geo. E. Chamberlain,

U. S. Senate,

Washington, D. C.

June 16, Rec.

Jul. 2 A. M.

Jul. 2 Ans.

Dear Senator:

Remembering with pleasure your very courteous

reception of me in Washington last March, permit me to state to you as member of the Senate Committee on Territories the following; My attention has been called to various statements made before your Committee by John E. Ballaine of Seattle.

In such statement on record of your Committee of May 2nd, Part 1, Mr. Ballaine claims to be the originator of the Alaska Central—(Northern) Railway project; claims to have desided the selection of the route; claims to have financed its initial cost, etc.

The congressional record and hearings before a Senate Committee being supposed to furnish facts only and true statements, I desire to object to Mr. Ballaine's statements above as untrue in every particular.

Mr. Ballaine is not the originator of the Alaska Central Railway project. This honor belongs to one J. M. Anderson a well known surveyor of Seattle and a man of the highest integrity. Mr. Anderson pointed out the practicability of such a road and organized and initiated with G. W. Dickinson and other friends in Seattle the Alaska Central Railway, in 1902.

Hon. G. E. C. #2.

Mr. Ballaine had been employed as a clerk up to that time by Jas. Moore, the well known promoter in Seattle, and as the latter tells me, dismissed for cause. He made then the acquaintance of the Surveyor Anderson and hearing of the Alaska railway project offered to act as selling Agent for the stock of the paper project, he to receive one-half of the proceeds of any stock sales. The Seattle Company

proceeded to sell and advertise such stock and by method now considered illegal, disposed of large amounts at figures varying from \$3 to \$6 a share. They realized about \$112,000.00 from such stock sales, principally in small amounts to purchasers in Minnesota, as Senator Knute Nelson may tell you. About \$50,000.00 of this money was used for further reconnaissance surveys of the projected road made by Mr. J. M. Anderson. With about \$3,000.00 more Mr. Ballaine purchased soldier scrip to locate, what is now, the townsite of Seward, buying with another \$4,000.00 the homestead rights of one Alfred Lowell, a half breed, who had settled in 1897 on the present townsite:

In January 1903 Mr. G. W. Dickinson and Ex-Governor McGraw of Seattle called my attention to their plans while visiting in Chicago, told me of their intention to raise funds for such a road and invited my assistance with the result that I asked some of my friends to join the enterprise. As their funds, raised by sale of so-called preferred stock were quite exhausted and the project dead to all intents and purposes, I organized the Tanana Construction Com-

Hon. G. E. C. #3.

pany with aid of one John Dowdle of Chicago and Robert Evans of Pasadena and left for Seward in August, 1903, to initiate construction with funds furnished by these friends. In January 1904, I induced my friends E. A. and C. B. Shedd of Chicago to loan to the project \$200,000.00 on security of all stock and bonds of the Alaska Central road, directors G. W. Dickinson, Ex-Governor McGraw, John Dowdle, John E. Ballaine signing such notes with such securities,

to which John E. Ballaine added, as further security, his claim to 160 acres townsite then pending in the General Land Office for patent.

Mr. Dickerman of St. Paul, Minnesota, a business friend of Shedd Bros. of Chicago, being advised of the latter's participation in the project purchased bonds to the extent of \$50,000.00 which amount with Shedd's \$200,000.00 enabled me in the summer of 1904 to build approximately 20 miles of the road and with the showing thus made the company was enabled to raise further funds. At the initiative of Ex-Senator Turner of Spokane and selling the property to a syndicate of Canadian Capitalist jointly with Mr. Frost of Chicago, the notes given to Messrs. Shedd were paid, the securities released and further construction started of the reorganized road under the presidency of Mr. A. C. Frost. Their subsequent failure and final reorganization as the Alaska Northern Railway is sufficiently known. It has been officially proved that altogether \$5,250,000 has been used to date in the enterprise, and not one cent of which was con-

Hon. G. E. C. #4.

tributed by Mr. Ballaine, excepting what he raised in selling so-called preferred stock in the formed paper project to gullible purchasers, principally in Minnesota. Contrary to his statement before your committee, such preferred stock was not at any time purchased or taken care of by him, or others, and is still held or used as wall paper by the purchasers, to the best of my knowledge and belief.

The above is the true history of the Alaska Central Ry. I refer you to the following most creditable witnesses:

Mr. Frank L. Ballaine, Seward, Alaska.

Mr. Wm. Ballaine, M. D., Bellingham, Wash.

(Brothers of John E. Ballaine.)

Mr. J. M. Anderson, (Anderson Map Co.) Seattle, Wash.

Mr. John E. Dowdle, = 145 LaSalle St., Chicago, Ill.

Messrs. E. A. and C. B. Shedd, = 306 LaSalle St., Chicago.

Mr. Robert Evans, Los Casitas, Pasadena, Cal.

Mr. A. C. Frost, Com. Exchange Bank Building, Chicago.

I do not wish Mr. Ballaine's untrue assertions to go unchallenged into public records and therefore make the above correction to you.

Mr. Ballaine's statement in the record regarding his negotiation with Messrs. J. P. Morgan and Co. are to the best knowledge and belief on par with his other presentations. Mr. Perkins denied knowing Mr. Ballaine when called in as a Witness before Judge Read of the U. S. District Court at Valdez and advised the President and Receiver of the Alaska Northern Ry. Co., Mr. O. G. Laberee that he would not at any time consider Mr. Ballaine of suffi-

Hon. G. E. C. = 5.

cient import to have any thing to say to him although the latter had constantly importuned him at several occasions for a hearing.

Very truly yours,

A. W. SANITZ.

**Exhibit No. 2 to Deposition of George H. Patrick—
Letter, July 3, 1913, Swanitz to Patrick.**

A. W. SWANITZ

Chief Engineer and Manager.

ALASKA NORTHERN RAILWAY CO.

Seward, Alaska, July 3rd, 1913.

Jul. 21, Rec. Jul. 21, P. M.

Geo. H. Patrick Esq.,

Atty. A. N. Ry. Co.,

#514 Southern Building,

Washington, D. C.

Dear Mr. Patrick:—

I have carefully read your letter of June 19th, referring to my letter of June 2nd, to Senator Chamberlain, and note your opinion that Ballaine under the circumstances referred to in my letter to Senator Chamberlain, has clouded his title to the Seward Townsite.

I had this day a conference with Judge Morford, refreshing my memory and comparing official records on file, now state the following: On page 3 of my letter to Senator Chamberlain, I stated that Messrs. E. A. & C. B. Shedd, of Chicago, loaned the paper project \$200,000.00 on security of all stocks and bonds of the Alaska Central Road; Directors G. W. Dickinson, Ex-Gov. McGraw, John Dowdle, John E. Ballaine and myself signing such notes payable March, 1905, with such bond and stock securities, to which John E. Ballaine added, as further security, his claim to 160 acres townsite then pending in the Genl. Land Office. I further recited that at the initiative of Ex-Senator Turner, the property was sold,

in the spring of 1905, to the Canadian Syndicate, with Mr. Frost, of Chicago, as President, the notes were paid and all securities released, including the Seward Townsite.

I had stated that John E. Ballaine obtained the money to purchase the Soldiers Scrip, to cover the G. H. P. #2.

160 acres, with money he acquired, as so-called Fiscal Agent and Secretary, of the Alaska Central paper project, in selling so-called preferred stock, out of the proceeds of which, he received personally 50% as commission.

One Mrs. Alfred Lowell and her sons were the original settlers of the present townsite, lived there for a number of years and had thus acquired certain homestead rights to the 160 acres in question. John E. Ballaine when he made this application for the 160 acres, in the fall of 1902, or spring of 1903, entered into a contract with this Lowell family to pay them \$4,000.00 cash and to give them 2½ acres, free of charge, next to the cabin where they lived. This contract was carried in effect in Oct. 1904, and to my personal knowledge the \$4000. were then paid out of the Alaska Central Railway Company's funds, or rather those of the Tanana Construction Company which I had organized and which was then building the Alaska Central Railroad, under contract for all of the Alaska Central Railway Company's bonds and stocks. This payment of \$4,000.00 I shall swear to and refer further to the two witnesses of the transaction—1st, Frank Ballaine, John E. Ballaine's brother, at that time representing John E. Ballaine,

as Vice-president of our Construction Company. 2nd, Eldridge R. Keeler, Esq., who's present Address is, c/o Monrava Construction Company, 85th, & Steward Ave., Chicago, Ill. Said Mr. Keeler was in 1904 a resident of Seward and Treas. of the Company. as representative of Shedd Bros. of Chicago G. H. P. #3.

who had furnished the construction money.

When these securities had been released by Shedd Bros., in 1905, the Trustee, Chas. L. Castle, deeded the townsite back to Ballaines, in June, 1905.

According to your view John E. Ballaine did not have a rightful title. Now under an agreement with A. C. Frost, the new president of the Alaska Central Railway Company, Frank Ballaine, under Power of Attorney of John E. Ballaine, made the following settlement, apparently anticipating your views, deeds were made and recorded at that time, as follows:

- 1st. Alaska Central Railway Co. 7 acres, 4 lots and lease of a strip of right-of-way through the townsite, expiring next year.
- 2nd. Deed to Ex-Senator Geo. Turner, Director, 40 lots.
- 3rd. Deed to Ex-Governor McGraw, Director, 10 lots.
- 4th. Deed to G. W. Dickinson, Director, 10 lots.
- 5th. Deed to G. Kain, Director, 10 lots.
- 6th. Deed to O. G. Laberee, Broker, 40 lots.
- 7th. Deed to Mr. Thompson, of Montreal, Broker, 20 lots.
- 8th. Deed to Col. G. Mahoney, Director, 20 lots.

9th. Deed to J. M. Anderson, Seattle, who originally planned the Alaska Central Railway and at the time threatened John E. Ballaine, with prosecution, 5 lots.

The remainder of the property, about 1400 lots, was then with John E. Ballaine and his brothers, Frank Ballaine and Dr. Wm. Ballaine. The latter G. H. P. #4.

had a falling out with his brother and was paid off with \$5,000.00 and I have his letter on file now denouncing his brother John as a swindler. Frank Ballaine still holds the majority of the lots of Seward, and I have his letter on file practically stating as facts all I had written to Senator Chamberlain. If ever the road is built from Seward, by private or public enterprise, the lots unsold would have an approximate value of about \$900,000.00, which is the reason, as you can readily comprehend, that John E. Ballaine is so anxious and indefatigable a worker on behalf of the dear public and the United States Government.

He has a habit of promising lots galore to everybody, including Chas. Heiffner, representative of the Seattle Chamber of Commerce, for their aid and assistance and has raised the money for his campaign expenses by pledging lots in the Seward Townsite for that purpose. Perhaps the fact that this wholesale lot distribution, to Laberee, Turner and others, is of public record has kept others from stating matters as plainly as I have stated above to you.

Mr. Jas. A. Haight, our Seattle attorney, should be cognizant of all the facts, but he is very peculiar

and apparently prefers to remain good friends to everybody.

Judge Morford here, whom I esteem highly as a very upright attorney, is attorney for the Ballaines and probably has his limitations in voluntary testimony.

G. H. P. #5.

Senator Chamberlain acknowledges receipt of my letter on June 17th, and tells me that my statements will have his consideration. He sends me copy of Bill 48 and tells me it will be reported favorable to the Senate.

I regret that I had to write so voluminous in order to give you full details. May I ask you to kindly supply the Trustees with copies of this letter?

Sincerely yours,

A. W. SWANITZ.

The books of the old Alaska Central are still being held by the U. S. Govt. ie. prosecuting Attorney. They should show the original contract with John E. Ballaine authorizing him to sell the preferred stock at 50% commission as fiscal Agent.

Question? Why are these books not returned to this Company?

**Exhibit No. 3 to Deposition of George H. Patrick—
Letter, July 30, 1913, Swanitz to Patrick.**

A. W. SWANITZ,

Chief Engineer and Manager.

ALASKA NORTHERN RAILWAY CO.

July 30th, Alameda, Calif.

Aug. 4, Rec.

Aug. 5, Ans.

Aug. 5, Ans.

Geo. H. Patrick, Esq.,

Atty. at Law,

Washington, D. C.

“In re Ballaine.”

Dear Mr. Patrick:

In reply to your letter of July 21st in re Ballaine: You state Page 2 “Ballaine positively denied that he sold or had any authority to sell the Cos stock” If it were possible to have him make an affidavit to that effect instead of blowing of hot air before a Committee it would be splendid to have such sworn statement from him as it would be the shortest and simplest way to land him behind the bars where he belongs. Both his brothers—Haight and L. V. Voak (now Fh. Agt. Rock Island Riway, Chicago) and myself with numerous other witnesses would promptly convict him of perjury. To stop his activities in Washington I should certainly advise early action against him. Yes? I informed you correctly that part of our right of way through the townsite is “on lease” only and expires next year when we will have to buy or get off the ground. All of which should

be on record in the old Alaska Central books, minutes and contracts as Mr. Morford advises me.

“In re Forestry affairs.”

I have collected copies of our contracts—reports etc. fully covering the Bird creek Timber transaction by which we lost the \$24285 worth of logs etc. All this matter as well as the Ballaine affair is rather too lengthy entirely for long distance correspondence—specially now when I have no typewriter or assistant. When you all get ready to take some definite action I had best be present in person to cover the ground and supply all evidence needed.

The Company in 1909 and 1910 operated sawmills at Glacier and Virgin Creek Mile 75 and 76 to cut bridge ties, guard rails and other necessary bridge timber. Timber found—after passing through the mill—to be partly unsound for railway purposes or defective or too small—was stacked in regular lumber piles at these sawmills. Our Agent in Kern Creek Mile 72 J. B. Patten was instructed to look after this lumber but under no circumstances to sell any of it as we doubted our right to do so. Some of the mines in that neighborhood—the Nutler and Dawson Co.—being unable to secure needed lumber any other way or by purchase—simply stole a lot of it last winter, amounting to about 30000 feet. My Agent Patten reported this to me this spring and was told to get evidence but again cautioned not to dispose of any of this lumber under no circumstances. Now my Superintendent Tozier reports as follows: “The forestry dept, are getting after Nutter and Dawson. In fact, Wood, the forest ranger came right out and asked Patten if he had sold any of the

lumber or had been told to do so by the R. R. Company; Patten said he had not sold and that whatever instruction he had from the Railroad—were his business and not the forestry departments but would volunteer the information that the company forbid the sale of any timber.” The forestry man told him that he would be wanted as witness against Nutter and Dawson.

The forestry people are busy as bees in the Chuchach reserve and are evidently going to made a big fight against us. I have seen dozens of press statements recently—all alike—that the forestry department had just saved 24 billion feet of timber from destructive forest fires, on Turn again arm.

I hope to have a chance to get a hearing before the Committee on the Alaska forestry question. I shall prove that the recent forest fire on Bird Creek could have only been started by the U. S. forester there.

I find Henry Clark will be in San Francisco Oct. 14th and have arranged to be the chairman of a reception Committee to receive and entertain him on arrival.

Yours truly,

A. W. SWANITZ.

**Exhibit No. 4 to Deposition of George H. Patrick—
Letter, July 30, 1913, Swanitz to Patrick.**

A. W. SWANITZ,

Chief Engineer and Manager.

ALASKA NORTHERN RAILWAY CO.

Alameda Calif July 30th 1913

Aug 2 Rec.

Aug 5 Ans.

Dear Mr Patrick.

As you see I am back home once more. Stopping in Seattle for a few days I had a long conference with Mr Haight "in re Ballaine."

We went over the whole ground "ab initio." I showed him copy of my letter to Senator Chamberlain and referred to my recent conference with Judge Morford.

Mr Haight gave it as his opinion—specially on account of the \$4000 payment to Lowells out of the company funds—that the Railway had a very good claim on the Seward townsite—that the so-called Frost settlement—giving Laberee and the old directors a bunch of lots without equivalent—constituted a fraud and would be declared null and void by any Court, etc. Now what are you all going to do about it? I note in press dispatches mention of some speech by Mr. Boland before the House Comittee.

Please supply me with copy.

It is very likely that I shall meet and have a long conference with Secretary Lane when he reaches Nevada or California in his itinerary. He sent me a personal request to that effect through the

Sargent of the geological survey. He is desirous to have my opinion on the value of the A. N. railway. I have written to the Jemmett for instruction in that matter and advised Mr. J. of my recent conference with Secretary Daniels in S. F.—You may consider it as an *absolute* certainty that it will be *Watnooska* not Behring river coal for the Navy. I have *positive* information and reasons to that effect.

Please note that *Derick Lane* is now in temporary charge of our property interests in Seward and any urgent information you may require by cable, please wire to him as he had my instructions to promptly attend to such matters in my absence.

Lane is an old friend of mine—an able accountant—son of a prominent old banking family of Troy, N. Y. formerly in the real estate and banking business in N. Y. and now president and owner of various well paying quartz mines in the Kenai peninsula.

All our affairs in Alaska I left in good shape and the road and wharf in fairly servicable and at least safe condition.

Trusting to hear from you at an early date stating present shape of matters in Washington etc I remain

Sincerely Yours

A. W. SWANITZ.

**Exhibit No. 5 to Deposition of George H. Patrick—
Letter, August 17, 1913, Swanitz to Patrick.**

A. W. SWANITZ,
Consulting Engineer,
853 Laurel Street.

Alameda, Calif. Aug 17th 1913

Aug 22 Rec.

Aug 26 Ans.

My dear Mr Patrick.

In my recent letter of reply to you "in re Ballaine" and evidence needed for a proper suit to recover the townsite I forgot to mention that I have a number of old documents for example

1st *original* contract and minutes of Directors meeting under the company's sign and seal accepting Shedd's proposal to furnish \$200000 and conditions thereof and Ballaine's additional townsite security.

2nd letter from Frank Ballaine, John E's brother and partner stating emphatically—without my request—that I and not Jno E. Ballaine financed the deal to build the first division.

3d letter unsolicited from Doctor Will. Ballaine, now a well known physician of Bellingham Wash. and former partner of Jno Ballaine stating the same and denouncing Jno. E. Ballaine as a hot air fraud and swindler.

4th letter from Shedd Bros stating the same and

5th numerous other old contracts and letters. All of which will be produced at the proper time.

Yours truly,

A. W. SWANITZ.

**Exhibit No. 6 to Deposition of George H. Patrick—
Letter, January 13, 1914, Swanitz to Patrick.**
Telephone Alameda 2314.

Cable Address

“Swanitz,” Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.

A. W. SWANITZ

Chief Engineer

Alameda, Calif.

853 Laurel St. Jan. 15th 1914.

Feb. 5, Ans.

My dear Mr. Patrick.

Your letters of January 7th received with thanks and hope you will send me Congressional record numbers giving account of the pending controversy, also get Scott Farris to send me a copy of the “Congressional directory.”

It seems you are the only friend the company has still keeping up a good fight. Under our Trustee Bolands instruction that the company does not wish to interfere in Washington unless for extension of its defunct franchises, I, as employee, had to cease my pernicious activities “pronto” and all my documents (including testimony that our friend Ballaine does not own the townsite except through courtesy and larchese of the Company) and correspondence are now neatly put away, labeled the different packages as “a Fools errand” “thankless efforts” “requiescat in pace” etc etc

I note what you say in re McPherson and Alaska Bureau. If you refer to my correspondence with

Maurice Leekey of Seattle of which you have copies—you will find his statement as to amounts paid by Guggenheims for support of the Alaska Bureau and the Alaska Junket—Leekey is a director of the “Bureau.” Incidentally you might ask McPherson how many solid gold match safes he has brought with him to Washington like the one his bureau presented to Set Mann (See my letters) and if he has his seat ticket for the Government “pap trough.” I certainly would do so but then I am big enough to play with that skunk safely.

Yours truly,

A. W. SWANITZ.

**Exhibit No. 7 to Deposition of George H. Patrick—
Letter, February 11, 1914, Swanitz to Patrick.**
Telephone Alameda 2314

Cable Address

“Swanitz,” Alameda, Calif.

ALASKA NORTHERN RAILWAY

A. W. SWANITZ

Chief Engineer

Alameda, Calif.,

853 Laurel St. Feb. 11th 1914.

Feb 16 Rec.

Feb 16 Ans.

My dear Mr Patrick

Yours of Febr. 5th in re Seward Ballaine Townsite matter duly received.

Once before I wrote to you in full stating among other items that the \$4000 paid to Lowells for the

townsite, to get them to relinquish their homestead rights—had been paid to my positive knowledge out of R. R. fund—that E. R. Keeler former Treasurer—whose address I gave you—would certainly swear to it as he had paid this money out of his funds by Ballaines order.

Accidentally I found among my old papers Mr. Keelers original letter press copy book and in it the letter copy of which I enclose which refers to the \$4000 paid by him as Treasurer of the Company. This book in my possession will be mailed to Stavert only at his personal request as President. Of course there was at that time no Alaska Central money. All transactions were, and all funds furnished to R. R. Co. by Shedd, in the name of the Tanana Construction Co owning and constructing the said Railway for all its bonds and stocks. But this \$4000 was paid to Lowells against my protest at the time because I did not want it paid for and charged to construction expenses which nevertheless was done against my objections. There is no earthly possibility of Ballaine being able to perjure himself out of that transaction.

You say you want me to send you all evidence. I decline to do so. 1st because the Stavert and Jemmett have never even had the courtesy to reply to my letters in this matter—neither had the Boland and therefore it would appear that they do not wish John E. Ballaine disturbed in possession.

2nd because one hours personal talk with you or whosoever would have this legal matter in hand would lead quicker to the point and essence of evi-

dence needed than many days work useless guessing and writing on my part as to evidence desired.

I have made plain statements—discussed the case with Morford and Haight and hence KNOW that we have ample evidence by living witnesses to prove that Ballaines ownership can be successfully disputed in Court, but if Strauss Stavert, Boland and Jemmett don't wish to save this most valuable asset for their clients why should I?

Respectfully yours,

A. W. SWANITZ.

“Copy”

Seward Sept 25th 1904.

Mr. Jno. E. Ballaine

Presdt.

Dear Sir.

Your favor of Sept 6th received.

I find that checks issued to date (not including the one for \$15000) have overdrawn our bank accounts (including \$4000 due on Lowell note) about \$2000 and we have \$18000 on hand here. This latter amount will provide for Oct 10th payroll and I will defer issuing any more checks as long as possible.

Mr. C. B. Shedd has kept me informed of all Chicago money transactions and I have made the necessary entries.

Yours very truly

(Sgd.) E. K. KEELER.

Mr. Keeler was Treasurer of all R. R. funds. Jno. E. Ballaine President—Frank Ballaine V. P. and myself Chief Eng. There was only one account for all expenditures and funds on hand.

**Exhibit No. 8 to Deposition of George H. Patrick—
Letter, February 14, 1914, Swanitz to Patrick.**
Telephone Alameda 2314.

Cable Address

“Swanitz,” Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.

A. W. SWANITZ

Chief Engineer

Alameda, Calif., 853 Laurel St.

Febr. 14, 1914.

Feb. 18 Rec.

Feb. 18 Ans.

Dear Mr Patrick

Referring once more to the “Seward Townsite case.” One of my neighbors here is a Mr Thos. West. Formerly from Toronto, Canada (He knows Mr Boland) he has practiced law in San Francisco for the last ten years—has a large and extremely profitable clientage from Alaska, Arizona etc. and been very successful in all his cases before the U. S. Court of Appeals etc. For my own information I have discussed this Jno Ballaine townsite matter thoroughly with my friend West and at my request he spent all day yesterday looking over a trunkfull of all my letters and documents relating to the former Alaska Central Railway, the Tanana Construction Company, Seward Const Co. and all letters telegrams contracts with Shedd's etc. in the years 1903, 1904 and 1905.

His final verdict was “Of course the Townsite belongs to the Alaska Central Railway and not to Bal-

laine who clearly layd himself liable to a verdict of proven fraud.”

I mention this for your own information.

Sincerely yours,

A. W. SWANITZ.

Exhibit No. 9 to Deposition of George H. Patrick—

Letter, September 10, 1914, Swanitz to Patrick.

Telephone Alameda 2314.

Cable Address

“Swanitz,” Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.

A. W. SWANITZ

Chief Engineer

Alameda, Calif., 853 Laurel St.

Sept. 10th 1914.

Sep 15 Rec.

Sep 15 Ans. to Bicknell

Sep 17 Ans.

My dear Mr Patrick.

Yours of Sept 2nd received.

I have at no time refused any data in re townsite. They are now and always have been at the Co.s service. I have stated to you that I have Mr. Keelers original letter press copy book in which his letter to Ballaine dated Sept. 25th 1904 mentions the payment of \$4000 a/c Lowell note. I have given you Mr. Keelers address. I have stated that I have no end of letters, data etc from which to refresh my memory of all these transactions. You only, and no one else, has ever asked me a question or intimated

that action might be taken against Ballaine to recover the townsite. I am no lawyer and don't claim to know and cannot guess what proofs, evidence statements de jure or in fact would be required. All I do know is that Ballaine had no money of his own—was deadbroke according to his own statement to me when we landed in Seward August 28, 1903, that he commenced to sell contracts for lots August 29, 1903. How he covered up his transactions in scrip—his \$4000 payment to Mrs. Lowell out of Company funds I am unable to say and is not in my province. Perhaps X Senator Turner and O. G. Laberee have correct knowledge as Ballaine's act in deeding them each 80 perfectly good lots in Seward free of charge, was scarcely a matter of spontaneous generosity.

I have told you that on my own account—to make sure of my statements to you—I presented all my evidence to Thos. C. West—formerly of Toronto Canada and now considered one of the leading attorneys on the Pacific Coast—handling successfully several great Alaska cases. He told me that we certainly had a sure case.

What else did you expect me to do? Force myself on Mr. Stavert who has not written me but one very short note in a year? and quietly ignored me?

Knowing the intimate relations between our Judge Morford and Mr. Haight with Ballaines I did not feel warranted to disclose all I knew to them but Mr. Haight, for whose honesty I always gladly vouch, told me we had a good case and would recover when I told him of my proof in writing that Mrs. Lowell

had been paid by Mr. Keeler out of the Company's funds.

Mr. Boland, Stavert or Jemmett have at no time hinted to me that my assistance, service or evidence in re Ballaine were desired or called for.

Therefore, please, amend your views and do not repeat that it were my fault if no suit is brought as "*good* lawyers will hesitate to involve their clients."

Good lawyers, in my opinion, should have, in fact, gotten busy long ago to protect the Company's interests by active work and at least asked me or Mr. Keeler such plain leading questions as would have determined legal facts and action.

I am now and always have been ready to do my part in the company's interests even if Otto Hansen wonderingly exclaimed to my Seward friends when he heard I was there this spring "Why? I am astonished! what is Swanitz doing here?" They told me in Toronto and Chicago (Frost) the Company was through with him!"

Sincerely Yours

A. W. SWANITZ.

Exhibit No. 10 to Deposition of George H. Patrick—**Letter, November 3, 1914, Swanitz to Patrick.**

Cable Address "Swanitz," Alameda, California.

A. W. SWANITZ

Consulting Engineer

853 Laurel Street

Alameda, Calif. Nov. 3d 1914.

Nov. 8 Rec.

Nov. 9 Ans.

"Personal"

My dear Mr Patrick.

I have your various letters and copies of letters received this day. In return I enclose copies of two letters I sent to Mr. Boland yesterday. They will explain to you a lot of things and the letter in re Laberee "will throw a beautiful search light into the ——'s camp. I did not mention to Mr Boland that Laberee told me "NOTHING" would be done in the Ballaine townsite case—that he had Mr Becknells positive assurance to that effect. It does look as if you and I had been and were wasting a good deal of ammunition. From Doctor Wm. Ballaine's statement to me in Seattle I thought we had a "cinch." Evidently we had the wrong pig by the ear and the "higher ups" don't care for any light on the subject. It's all such an awful disgusting mess that I am utterly sick of soiling my hands with it and were it not for the fact that I first want to see you—Haight and Morford paid—along with my own dues, I should not waste another postage stamp on the outfit.

Laberee bluntly admitted to me that he had "Inside" help in soaking the bondholders for the 1/10 Interest and its resultant settlement—You strongly believe in the Staverts good intentions. So do I. His whole appearance and personality is against any other assumption. But! is it not his business to protect the Company against graft and grafters? I have no objection at all to you mailing a copy of this correspondence to Mr. Stavert to England but to him ONLY.

Now regarding your very just claim.

In the first place! Last March our cash resources in Seward had dwindled down to about \$150. with an average monthly expense for labor maintenance and supplies of \$560. We had to borrow, on our personal security about \$2000 from the bank, every time a steamer arrived, to meet the customary prepayment of all freight bills. I asked for funds time and time and time again by letter and wire. Mr. Stavert ignored me in toto. Jemmett only wrote he had or would resign. Mr. Boland had no answer, even when I wrote and wired that the Seward office could not meet any further the \$315 per month to Messrs Haight, Patrick, Morford and Seattle office rent. It was a disgraceful situation to leave me in, till I finally took matters in my own hand and, ignoring the Toronto office, borrowed enough funds from friends to take me to Seattle and Seward to personally meet the situation. Mr. Otto Hansen, Mr. Clarkson's and Frosts friend arrived and was astonished to find me in charge—"Why" they told me in Toronto that they were going to send a new man—Mr. Kyle—in

place of Swanitz!" T'was funny—but Swanitz was there—attended to the Company's affairs and advised Kyle not *too* make too big a jackass of himself. In the meantime I carefully nursed our receipts and expenditures—till I finally now have something like \$3600 cash on hand in Seward which Tozier has my strict orders to pay ONLY on my order. I have to retain \$2000 in Seward for wharf business. The cost of appeal and sundry legal expenses will be \$400. The remainder—after paying local payroll etc I mean to distribute this month to you—Haight Morford and myself in equal shares as per my letter to Boland.

Sincerely Yours,

A. W. SWANITZ.

**Exhibit No. 11 to Deposition of George H. Patrick—
Letter, September 12, 1914, Patrick to Bicknell,
Bain, Macdonell & Gordon.**

GEO. H. PATRICK

Attorney and Counselor at Law

514 Southern Building

Washington, D. C.

Subject. Seward Townsite.

Answer to September 9.

Washington, D. C.,

September 12,

Nineteen Fourteen:

Dear Sirs:

I have, as doubtless you would surmise, only hearsay knowledge of the Seward Townsite transaction;

but I have saved all the information coming to me, and Col. Swanitz always has given me to understand that he had preserved sundry documentary evidence, in addition to his personal knowledge of payments and entries, sufficient to establish the trusteeship, some of the documents perhaps acquired after he assumed control. I never have known the character or extent of his proofs; but he told me that he submitted them to two good lawyers, whom he named, and was advised they would sustain action. He told me that he knew of his own knowledge that the \$4000 was taken from the Company's funds, paid to Mrs. Lowell, charged against construction account; and that he protested. This latter would have been natural, from his well known economies in construction and jealousy of unnecessary addition to his estimates, particularly without his initiation. As heretofore mentioned, he refused to let me have these papers, or the legend, when I asked for them to determine for myself their legal value. He wished to bring them east and first be assured they would be used in proper litigation, and not to advise Ballaine so that he could mend his fences. Most of my information via Swanitz is in correspondence.

Sundry Journals, Ledgers, etc., of the Alaska Central Railway and Tanana Construction companies, covering the period August, 1903 to October, 1905, are in my hands. They were sent to me as these company's books; but there should be more somewhere. I have no day-books, or blotters, the books of original entry, and presume they are in Seward,

if anywhere. I understand that Mr. Haight (Secretary) has the minutes and similar books, in Seattle.

I find one \$4000 entry in Journals and Ledgers of both companies, bearing suspicious earmarks. It purports to be dated October 11, 1904, some four months after the due date of the 9 months note given Mrs. Lowell on September 3d, 1903, and to be a cheque on the Washington Trust Company, a Seattle institution, I assume. It is charged to construction account. So far, the variance in date being explained by delay in payment, the item seems to bear out Col. Swanitz' allegation. On one page of the journal are entered all of the cheques upon the Trust Company, numbered consecutively, for the month of October. Cheques were issued on 7th, 11th, and 12th, numbered 8, 9, 10, 11; but the above \$4000 cheque is entered after the last number (17) and last date (25th), with the date of this cheque (11) in different ink from the credit "Tanana Constn. Co." to the Trust Company, and the number is "0," with a check-mark and small *c* both in red ink immediately before the figures 4000. The 0 seems to have a . in the centre. The bank-books might throw some light upon it; but I would not expect to find Mrs. Lowell's signature on the cheque, nor anything by which she could be connected with the transaction, unless the parties were careless beyond any kind of prudence. Naturally, evidence *dehors* the record would be required to show that the proceeds of this cheque went to Mrs. Lowell. On October 11 is a cheque to John E. Ballaine. I am going carefully over the books to trace the expenditure and balancing of this cheque,

and will try to give you the result by early next week's mail. It is unfortunate that the books of original entry are missing; but I am writing Superintendent Tozier to search for them and to let me know what are in Seward.

The Company dealt somewhat in scrip in those days, but none of the entries on the books I have could have covered the townsite. \$6040, (920 acres) is charged in September, 1905, of which \$1970 (320 acres) is undisposed of, unless used in some way, the remainder appearing as re-sold by Frost & Co. Probably the stock money was taken during the Shedd financing. Col. Swanitz was then with the Company, looking after the Shedd interests, as I understand; therefore in position to know at first hand what was going on. Frost & Co. took up all the original indebtedness, unless the stocks and bonds held by Shedd Brothers, and their friends, represent part of the payment.

I have lately written Col. Swanitz a strong letter on the subject of the townsite, and hope it may produce results. He usually becomes penitential after one of these.

Respecting the extent of the Ballaines' present holdings, the latest date I seem to have is the Seward Gateway tax sale advertisement of December 3, 1913, wherein Jno. E. Ballaine's lots filled three columns, several hundred in number. He was then trying to borrow money. I think he approached Messrs. Boland, Stavert and Jemmett, amongst others, to borrow \$25,000 on the Seward security; and he must have obtained some money about that time, from some one. He either paid his taxes or the lots were

bought in by the town. I have lately heard, although not from Seward, that Ballaine was making frantic efforts to take advantage of this year's extraordinary boom, and had made some sales; but, as I also heard that he had refused \$5,000 for choice lots, I think the purchasers may have acquired only an equity. Some three or four months ago I was told that not one vacant building was to be found in Seward. I think it may be assumed that the Ballaines yet hold a very large portion of the town, and deferred payments amounting to a considerable sum. We could not expect to recover from innocent purchasers for value; and, given a straight tip that we propose to sue, doubtless transfers covering all their holdings would be made between two days by both Ballaines.

I will get the information about their present holdings, somehow; but I hesitate to write to anyone in Seward because uncertain how confidentially my inquiries may be treated. Superintendent Tozier probably would be discreet, and Judge Morford would try to be; but I assume that Ballaine is in and out of the latter's office, and would be apt to note any letter from me, probably would not scruple to open if he could with safety. The matter is rather complicated by wheels within wheels, and nearly every one likely to kick at any time has been given lots. Ballaine has boasted of the (want of) consideration for many lots so conveyed, to shut the mouths of some of his associates. The lowest price at which I have ever seen any lot quoted, this in the years before any boom, is \$200; and they have graded up to four and even five figures.

The Company's books (Alaska Central) were taken to Chicago to be used in the Frost trials. All were supposed to be there. Only a few have been sent to me. Whether all or only part of those taken to Chicago, I do not know. What I have were to show the cost of the road. They were shipped by Mr. Laberee, upon Mr. Boland's order, but I do not know the precise directions. I assume just generally the books evidencing the construction cost, but they are insufficient for that purpose; although convincing as far as they go. I expect to have a tolerably complete statement of the actual cost by the time the Engineer Commission returns here, fortunately, having a good deal of data outside the books above referred to. That does not bear upon Seward, however.

I am sending carbons of this letter to Messrs. Stavert and Boland, and you might get with the latter and conclude where some more books ought to be. He may know whether I have all or only part of the books that went to Chicago; and I am writing Mr. Laberee (copy enclosed), to know if he has any others under his control. For various reasons all the books of the two companies ought to be—somewhere.

Very truly yours,

GEO. H. PATRICK.

Messrs. Bicknell, Bain, Macdonell & Gordon,

Barristers and Solicitors,

Lumsden Building,

Toronto, Ontario, Canada.

Carbons to Stavert and Boland.

**Exhibit No. 12 to Deposition of George H. Patrick—
Letter, September 15, 1914, Patrick to Bicknell,
Bain, Macdonell & Gordon.**

GEO. H. PATRICK,
Attorney and Counselor at Law,
514 Southern Building,
Washington, D. C.

Subject. Seward Townsite.

Answer to September 9.

Sent WJB Apr 21' 1915.
Washington, D. C.,
September 15,
Nineteen Fourteen.

Dear Sirs:

Under date September 10, received this morning,
Col. Swanitz writes:

“I have Mr. Keeler’s original letter-press copy-
book, in which his letter to Ballaine, dated *Sept. 25th,*
1904, mentions the payment of \$4000 a/c Lowell note.

I have given you Mr. Keeler’s address. I have
stated that I have no end of letters, data, etc., from
which to refresh my memory of all these transac-
tions. * * * I know that Ballaine had no money
of his own, was dead-broke according to his own
statement to me when *we* landed in Seward, August
28, 1903, that he commenced to sell contracts for lots
August 29, 1903. * * * I have told you that, on
my own account, to make sure of my statements to
you, I presented all my evidence to Thos. C. West,
formerly of Toronto, Canada, and now considered
one of the leading attorneys on the Pacific Coast,

handling successfully several great Alaska cases. He told me that we certainly had a sure case.

Note. West is Republican candidate for State Senator in 14th California District.

“Knowing the intimate relations between our Judge Morford and Mr. Haight with Ballaine, I did not feel warranted to disclose all I knew to them, but Mr. Haight, for whose honesty I always gladly vouch, told me we had a good case, and would recover, when I told him of my proof in writing that Mrs. Lowell had been paid by Mr. Keeler out of the Company’s funds.”

I do not recall that I ever have been advised of Mr. Keeler’s address, but that is readily supplied, as Swanitz has it. His full name, according to the account-books, is E. R. Keeler. The date of payment fairly corresponds with the entry of \$4,000 on October 11th, as items bearing date in August and September appear following that entry. Swanitz’s statement of the first selling of lots by John E. Ballaine precisely confirms the letter of C. O. Lambert, at page 14, Case 56, of the record sent you last week. I do not know Keeler’s position with the Company, and, so far, my examination of the books does not disclose it. If the Company’s book-keepers were experts, it is a queer set of books they kept. If they were not professional accountants they succeeded in mixing up things in a way few skilled men could have done. I doubt if any one could correctly interpret the books without knowing something more of the relation of one thing with another than any of us know. I assume you are aware that the Tanana Railway

Construction Company was organized to become the Credit Mobilier of the Railway Company, to subtract a certain percentage, apparently, of the Railway moneys, under color of—business; and whether I am going through the books of the Construction or Railway company I am not at all sure. I should say the latter without qualification but for the fact that they are rubber-stamped in various places “Construction Company”; and the several accounts, or some of them, appear to be drawn off in the trial balances as “Railway Company.” Then again, I find two journals, covering almost the same periods and the same items, with an occasional exception. I have an indistinct impression that Mr. Jemmett went over the books at Seattle, or Seward; and he may know the whereabouts of Mr. Winter, who was book-keeper, auditor, or expert accountant auditing the books. After I shall send on my excerpts you would do well to go over them, and my comments, with Mr. Jemmett. It is evident that we shall need the blotters, and all other memorandum-books in existence, as well as a *careful* examination of all the minutes, etc., now or heretofore in Mr. Haight’s hands, as Secretary. Swanitz mentions the conveyance, without payment, of some 80 lots each to Mr. Laberee and Senator Turner; but the latter rendered considerable professional services, and was also a stock-holder.

I think I have some company audits, and will go over them before concluding what the books show and were intended to show, whereby the result may be delayed a little. I never have seen just such a set of books; and if the company book-keepers were ex-

perts, it is all the more puzzling. October, November and December are as apt to be followed as preceded by August and September, and dates and serial numbers are all mixed up. Apparently the railway and construction companies checked, bought, sold, expended, etc., interchangeably, while credits to the Washington Trust Company and the Washington National Bank appear in the same columns, and so on. Then, a book has the elements of cash, journal, ledger and memorandum, yet, purports to be but one of these, with a doubt as to the company to which belonging. Two or three series of check-books appear to have been running concurrently, *chacks* of the same day, entered on consecutive lines, being numbered 100, 500, 1500; and both companies cheques are posted in the same ledger account—this, if two sets of accounts were kept, and I have both, something I am trying to ascertain, without hinting my object.

Very truly yours,

GEÔ. H. PATRICK.

Messrs. Bicknell, Bain, Macdonell & Gordon,

Barristers and Solicitors,

Lumsden Building,

Toronto, Ontario, Canada.

Enclosures.

**Exhibit No. 13 to Deposition of George H. Patrick—
Letter, September 16, 1914, Patrick to Bicknell
Bain, Macdonell & Gordon.**

GEO. H. PATRICK,
Attorney and Counsellor at Law,
514 Southern Building,
Washington, D. C.

Subject. Seward Townsite.

Answer to September 9.

Washington, D. C.,
September 16,
Nineteen Fourteen.

Dear Sirs:

Herewith find copies of the following correspondence, re the Seward Townsite, some of which, by reason of its having been with Col. Swanitz' general file, instead of with the Townsite, I had allowed myself to forget in some details:

1. Sep. 25, 1904. E. R. Keeler, Treasr., to John E. Ballaine, reporting payment to Lowells of \$4000.
2. Jun. 2, 1913. Swanitz to Senator Chamberlain.
3. Jul. 3, 1913. Swanitz to Patrick.
4. Jul. 30, 1913. Swanitz to Patrick.
5. Jul. 30, 1913. Swanitz to Patrick.
6. Aug. 17, 1913. Swanitz to Patrick.
7. Feb. 11, 1914. Swanitz to Patrick.

Vide extracts from Swanitz' Sep. 10, 1914, letter to Patrick, quoted in my letter of September 15, confirming statements in enclosures.

Treasurer Keeler's letter creates a belief that the \$4000 to Mrs. Lowell was either paid, or covered up, in the October 11th, 1904, \$4000 cheque, which may not have been issued at its date, on account of the overdrawn account, or may have been dated considerably later than its issue. It is evident that the date appearing in the journal entry is no proof that it was issued on that day, indeed, the fair presumption is that it was some sort of an afterthought, the number being 0, and the date being filled in the regular order. I would expect the payment to have been in cash, of which \$18,000 seems to have been on hand at Seward, or, the cheque to have been cashed in Seward. Some one of the witnesses to the transaction, all yet living, apparently, must know all about this.

The enclosures set forth somewhat more detailed statement of the townsite transaction than you have, and the conveyances by Ballaine to Shedds' trustee, and back again, if in the name of John E. Ballaine, furnish food for thought and—litigation. Neither Ballaine then had any real title to convey; but any assertion of ownership by John E. Ballaine during this period, 1903–1904, may be pertinent, also embarrassing, sometime.

Very truly yours,

GEO. H. PATRICK.

7 Encl.

Messrs. Bicknell, Bain, Macdonell & Gordon,
Barristers and Solicitors,
Lumsden Building,
Toronto, Ontario, Canada.

CLERK'S NOTE.—Pursuant to stipulation of counsel for the respective parties, filed December 1, 1919, as appears at page 120 of Record herein, the inclosures referred to in said letter are omitted as a part of said exhibit, for the reason that they are copies of exhibits already printed herein, viz.: Exhibits Nos. 1, 2, 3, 4, 5 and 7 to Deposition of George H. Patrick.

**Exhibit No. 14 to Deposition of George H. Patrick—
Letter, December 5, 1914, Patrick to Stavert.**

GEO. H. PATRICK,
Attorney and Counsellor at Law,
514 Southern Building,
Washington, D. C.

Seward Townsite.

COPY FOR INFORMATION.

December 5, 1914.

Dear Mr. Stavert:

It would fairly have been my duty, under the most ordinary terms of professional employment, to advise you of anything coming to my knowledge that might seriously affect either the Company's or your own interest; but my original employment was almost wholly for this purpose. A good many extra calls have been made upon me, growing out of the connection, some of which have entailed expense, that is another story; but, I believe what came to me, without inquiry or suggestion of mine, was required to be communicated, and sometimes, I have thought I ought to tell you, as I have told, my opinion thereon. The following came to me, in such manner as to compel belief.

1. That John E. Ballaine bought the scrip with which the Seward Townsite (Survey 726) was located with \$3000 derived from the sale of stock belonging to the Alaska-Central Railway Company, the money also being company money.

2. That \$4000 paid Mrs. Mary Lowell, for her prior rights, which she relinquished for such consideration, had been taken from the above company's Seward funds and charged against construction.

3. That the land entry, as subsequently developed, was in the name of Frank L. Ballaine, a brother, then in partnership with John E. ; but that John E. always claimed and asserted ownership and control everywhere except in the United States Land and Recorder's offices. That the whole transaction, so far as the Ballaines were concerned, was in fraud of the United States and the Company.

4. That John E. Ballaine mortgaged the whole of the Survey 726 to Shedd Brothers, prior to patent, receiving back a release after Frost bought in and took over Shedd's claims; that he gave and sold lots to many persons, and since has held large numbers of lots in his own name.

5. That John E. Ballaine was Secretary, managing director and controller of the Alaska Central Railway, and President, controlling stockholder, and manager of the Tanana Construction Company, which built the first section of road, occupying a fiduciary relation towards both and all, of which he was in absolute control in Alaska.

6. That false entries were made in the books to cover up these transactions.

7. That John E. Ballaine had boasted with such circumstantial and persistent repetition as to produce general belief in Seward, and considerable elsewhere, that he had purchased absolution and protection from responsibility from *all* the corporations concerned.

On this state of facts I advised and urged that you should take the opinion of your own, perhaps also the counsel of the owners, who happened to be the same person, although I did not then know it, as to whether Ballaine should be held to account as Trustee for the Alaska Central Railway Company, all whose property and rights had come to the Alaska-Northern, at the same time expressing my own view that recovery seemed to be undoubted, in the absence of some defense I could not surmise. I was particular to caution against any publicity that should notify Ballaine so that he might transfer his title, or otherwise complicate proceedings. Messrs. Haight and Morford, formerly, perhaps yet Ballaine's lawyers, Mr. Frost, Mr. Labaree, Col. Swanitz, Mr. Keeler, former bookkeeper and cashier, or treasurer, who paid the \$4000 to Mrs. Lowell, probably others, have been corresponded with, and all of them have made statements, generally hearsay, except Keeler. Ballaine knows everything discovered, at least in a general way, and that the question of legal proceedings against him is under consideration. He has not been informed through me, directly or indirectly. That is not my affair; I have had to do only with passing along such information as came to me, more or less annotated.

Mr. Haight interviewed Mr. Keeler, in Mr. Frost's Chicago office, whence he proceeded to Toronto; and Mr. Frost wrote a somewhat circumstantial letter to Mr. Boland. Their accounts, which are supplemented by letters from Haight and Morford, and by Mr. Haight's verbal statement, as to the \$4,000 are:

Keeler represented to Shedds, who advanced all the first construction money, to see to proper disbursements on the order of Swanitz, Shedds' selected engineer.

Keeler says:

That Frank Ballaine told him about some claim as he was sailing for Seattle. That this \$4,000 Lowell note, accompanied by documents, was presented to him next day as such claim, and appeared to be a lien upon *upon* mortgaged Seward; that he wired Swanitz out on the line, and Swanitz said pay it, he paid the note, took an assignment of the papers to himself, advised *John E. Ballaine*, demanding repayment; charged same to himself, on the books, as trustee, opening an account therefor in his name as trustee, which was balanced by a subsequent repayment by John E. Ballaine, in the shape of a credit at the Seattle bank.

Contra:

Swanitz says he did not advise this payment, and that Frank Ballaine was in Seward when the \$4,000 was paid, as is shown by his books and as at least two reputable persons who know will testify. We have Keeler's letter and the books. The letter contains no reference to re-

payment; indeed, its tone is quite the contrary. No such charge appears against Keeler, no such credit; no account is in his name on the books; no such payment appears in the account of the bank. The \$4,000 cheque, which may have been cashed, as Keeler says he paid Mrs. Lowell in money, is charged against construction, and the ledger account is duly balanced without any Ballaine credit.

This is precisely as *we* have understood; but always has been some doubt whether proof could be made, at this late date, of the purchase of the scrip with company money. Messrs. Frost, Haight and Morford were of opinion that Ballaine bought this out of his very liberal 40% commission upon the stock he sold. The whole stock transaction was a fraud, *none of the receipts* from sales to innocent, usually small investors, over a wide area, having been used, or intended to be used for the construction of the road or other legitimate company purpose, only, to be divided among the promoters, so that Ballaine's 40% commissions, as much as the 60% over, were company money for any purpose connected with proposed litigation to restore title of Seward to its rightful owners.

It has been asserted, although not yet proven, that Ballaine put through, on the company's books of minute, some resolution by the directors, in substance, whitewashing his Seward transaction. I assume that this was in sufficient legal form to accomplish its intention, and was done. The answer is that the action of the stockholders was necessary,

after due notice, to divest legal or equitable title to real estate, particularly, when the act is practically a gift without any consideration. The books show a paid and balanced John E. Ballaine expense account of \$28,000, with whose details no one is acquainted; and he drew a large salary \$5,000 or \$6,000 a year, with liberal expenses paid as incurred. Mr. Labaree once informed me that this \$28,000 really was money owing by Ballaine, and represented amounts he had appropriated. Secretary Haight says he knew nothing of such expense account. I only know what appears on the books.

Quite recently, since I have written to you or Mr. Bicknell on this subject, I have been reliably informed that it is capable of positive proof by a witness having personal knowledge of the entire transaction, that the \$3,000 paid for the scrip was taken from sales of company stock, not from John E. Ballaine's commissions, as well as the later \$4,000 payment from the company funds, some year and more later.

I am informed that it can be satisfactorily established that John E. Ballaine was wholly without means before he began to exploit the Alaska Central stock-sales, and that he has since earned no money outside that company and its subsidiaries and the accretions of company assets, including property company money bought.

Ballaine has paid taxes, and it has been strongly urged that he would be entitled to credit therefor, enough to equal the value of the property remaining. Granted, for the sake of argument; so would he be

chargeable with the very much greater sums received from lots. The balance would probably be some hundreds of thousands of dollars against Ballaine, who also paid these same taxes out of money equitably belonging to the company; and it would be passing strange could money be so juggled that it could serve two masters at the same time, unless one were subordinate to the other.

CONCLUSION.

It is reasonable to assume that every defense Ballaine, his lawyers and friends can devise has been presented. I give you the substance of what has been submitted to influence my judgment, which, for some reason, it has been desired should be in harmony with others. Upon the whole case, he has no defense; the two, or three as the case may be, Ballaines can be held as trustees for the company, and a court of equity would vest legal title in the Alaska-Northern.

Mr. Boland has written several letters to me on the subject, submitting, I assume, all the information he has been able to dig up; Mr. Haight has interviewed persons connected with the different companies, and he came here, last Saturday, and we went carefully over the books together. I have sent the late Mr. Bicknell's firm a considerable volume of data. I have answered everything that has come to me from any one.

So much I am constrained to say at this time. I presume it will be my last communication on the subject. It is for you to do what you please with.

I have complete transcripts of the records of the

Land Office, showing location, surveys, etc., also a number of documents, plats, and memoranda. In a general way, Mr. Bicknell was informed, in his lifetime. I understood from Mr. Boland that Mr. Bicknell had reached the conclusion an action could be maintained, and ought to be brought; without saying so, such was the tone of his letters to me. I have been told that Mr. Labaree, a lot owner, who saw him shortly before his death, later than any of my own correspondence, stated out west that Mr. Bicknell told him no action would be brought. I have had no communication with Mr. Bicknell's successor as bank counsel; and I do not know who, if any one, now represents you.

Very truly yours,

GEO. H. PATRICK.

W. E. Stavert, Esq're,

President, Alaska-Northern Railway Company,
Tyrrell Building,
Toronto, Ontario, Canada.

Encl.

Suit for the recovery of Seward will be barred by the statute of limitations, January 13, 1915, or May 5, 1915, according to two possible constructions.

[Endorsed]: District Court of the U. S., Western District of Washington. *J. E. Ballaine vs. W. J. Boland*. Deposition of George H. Patrick, for Dfdts. Alexander H. Galt, Notary Public and Commissioner. Fee, \$10.50.

[Endorsements on envelope containing Deposition of George H. Patrick]: Addressed to Frank L.

Crosby, Esq., Clerk of the District Court of the United States for the Western District of Washington, Seattle, Washington. From A. H. Galt, 436 Southern Bldg., Washington, D. C.

Filed in the U. S. District Court, Western District of Washington, Northern Division. March 20, 1917. Frank L. Crosby, Clerk. By Edw. Lakin, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed December 5, 1919. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 1—Certified Copy of Opinion
etc. Alaska Northern Ry. Co. vs. Alaska Central
Ry. Co. et al.**

**Certificate of Clerk U. S. District Court to Opinion,
etc.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original Opinion, Findings of Fact, Conclusions of Law, and Judgment in cause No. 720, Alaska Northern Railway Company, Plaintiff, vs. Alaska Central Ry. Co., a Corp., Tanana Construction Co., a Corp., John E. Ballaine, Frank L. Ballaine et al., Defendants, and E. A. Shedd & C. B. Shedd, Intervenors, and J. H. Macklin and International

Assets, Ltd., Substituted Intervenors, as the same appears on file and of record in my office.

In testimony whereof I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 13th day of November, 1915.

[Seal]

ARTHUR LANG,
Clerk.

By K. L. Monahan,
Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 720.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a
Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN E. BAL-
LAINE, FRANK L. BALLAINE et al.,

Defendants.

**Opinion Alaska Northern Ry. Co. vs. Alaska Central
Ry. Co. et al., No. 720, in District Court for the
Territory of Alaska, Third Division.**

This action was commenced on April 29, 1915, by the plaintiff, the Alaska Northern Railway Company, as successor in interest to the Alaska Central Railway Company, claiming to be the equitable owner of about 159 acres of land, known as the Town-site of Seward, which it alleges the defendants,

John E. Ballaine and Frank L. Ballaine, acquired in their own names, but in trust for the Alaska Central Railway Company.

The bill alleges that prior to the year 1905, defendant John E. Ballaine, being an officer of the Alaska Central Railway Company, procured for himself, but in the name of his brother, Frank L. Ballaine, title to the said land, diverting funds under his control belonging to the said Railway Company, to pay for the same, to wit: \$3,000 to pay for soldiers' additional homestead scrip with which to patent said land, and \$4,000, with which to secure the relinquishment of Mary Lowell, who at that time occupied and claimed said land as her homestead; in fraud of the rights of said Railway Company. That said land was patented in two tracts in the name of Frank L. Ballaine, one patent dated May 1, 1905, and the other May 20, 1905.

Defendants John E. and Frank L. Ballaine by their answers deny that said land was acquired by them in any other way than in their own right (John E. owning two-thirds and Frank L. one-third); deny all the claims of the plaintiff; allege that they paid all expenses for patenting said land, including cost of soldiers' additional homestead scrip and \$4,000 paid Mary Lowell for a release of all her claims to said land out of their own funds. They also set up certain further defenses by way of estoppel, viz.— laches in bringing said action; that said Railway Company is not empowered under the law to take or hold any lands except for the actual and necessary requirements of its railway business; that no right

to said lands was ever claimed by the Alaska Central Railway Company and none transferred by the deed to the plaintiff company; and estoppels by the acts of the Railway Company in that deeds conveying certain portions of said land were made to and accepted by said Alaska Central Railway Company, by the Ballaines, and later transferred to the plaintiff, the Alaska Northern Railway Company.

It is a matter of grave doubt if one or more of these further defenses or pleas in bar would not be sufficient to defeat the plaintiff's cause of action.

On the question of laches: In *Wood vs. Carpenter*, 101 U. S. 135, the Court says:

“In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether by ordinary diligence, the discovery might have been made before.”

In this case nearly ten years elapsed before the claim was made that said land was not the rightful property of the Ballaines, and no reason or excuse whatever is offered why the claim was not sooner made; no diligence whatever is shown or any effort made to ascertain the facts, until, by reason of the Government of the United States taking over said railway property, the townsite of Seward acquired a speculative value which it had not had before in years.

On the question of the right of a railway company in Alaska to acquire and hold land, other than what is necessary for its actual needs for railway purposes,—the right is at least very doubtful.

There is no statutory authority given for such ownership, even though, as in this case, the articles of incorporation provide for the acquiring of townsites, as they provide for the acquiring of almost every kind of property and engaging in every kind of business known to the ingenuity of man in the preparation of such documents. The case of *Case vs. Kelly*, 133 U. S. 21, seems to be very much in point on this question, and it is there held that in the absence of statutory authority a railroad cannot lawfully take or hold land, other than what it actually requires for depot, terminal and station grounds, and that a trust similar to the one claimed by plaintiff in this case, although there clearly recognized, would not be enforced for said reason.

There is some doubt as to the defense that no conveyance or transfer was ever made to the Alaska Northern Railway Company expressly mentioning any right, title or claim of the Alaska Central Railway Company in or to said townsite.

There is also considerable doubt as to the effect of the acceptance of the deeds made by the Ballaines to the Alaska Central Railway Company of certain tracts and lots in said townsite.

It is always better and more satisfactory, however, that a case should be determined upon the merits where possible than to go off upon legal questions which may be open to much disputation. The latter

course may be more interesting to lawyers but not so satisfactory to clients.

A demurrer to plaintiff's complaint was overruled; likewise a motion for nonsuit at the close of plaintiff's testimony; both plaintiff and defendants have had the fullest opportunity to introduce every bit of evidence bearing upon the question involved, and while it is true that a great mass of evidence, oral and by deposition, by book and document, has been received in evidence, much of it is superfluous. From that evidence it is possible to determine satisfactorily the real truth of this controversy.

There is very little difference between the facts shown by the testimony of the plaintiff and defendants; there is a wide divergence of opinion between plaintiff and defendants as to the inferences and conclusions to be drawn from the facts.

It may be said at the outset, however, that the plaintiff has wholly failed to substantiate the allegations of its complaint to the effect that defendant John E. Ballaine or defendant Frank L. Ballaine ever diverted any funds at any time or in any sum whatever from the Alaska Central Railway Company, or the Tanana Construction Company, or ever had the funds of either company under their control. The undisputed testimony in the case shows that they paid all expenses of surveying and patenting the land in controversy, including the cost of soldiers additional homestead scrip (about \$2,000) and the \$4,000 paid Mary Lowell for her relinquishment, from their own funds.

The Alaska Central Railway Company was incorporated under the laws of the State of Washington, March 30, 1902, largely through the efforts of defendant John E. Ballaine, its object being to survey a route and if possible build a railway line from the southern coast of Alaska to the interior of the country, reaching the Tanana or Yukon River. The names of the trustees designated in the articles of incorporation were:

G. W. Dickinson,	Seattle, Wash.
E. E. Caine,	“
Charles L. Denny,	“
J. W. Godwin	“
John E. Ballaine,	“
George Turner,	Spokane, Wash.
Charles F. Peck,	Omaha, Neb.
John H. McGraw, of the State of Washington.	

Neither Charles L. Denny (by reason of ill health) nor Charles F. Peck (for some other reason) ever qualified or served as trustees. Later F. Aug. Heinze and James A. Haight were selected to take the places of the said Denny and Peck.

A limited amount of money was raised and a survey party was sent to Alaska in 1902, which began surveying near the head of Resurrection Bay. The survey party was under the charge of C. M. Anderson, a civil engineer. Many locations of various kinds, mineral and nonmineral, were made or attempted to be made by this party, along the shores of Resurrection Bay, extending a distance of some ten or twelve miles along the shores and around the head of said Resurrection Bay.

At that time the land in controversy was occupied and claimed by one Mary Lowell, a Russian woman who had married an American and was living on said land with her family of children. A few nonmineral locations for railway terminal purposes appear to have been made adjoining the land claimed by Mrs. Lowell. All of these locations, while it does not clearly appear by whom they were made, were presumably made under the authority of the engineer, Anderson, but no location appears to have been legally initiated at that time or followed up by the acts necessary to divest the title from the United States, except as certain portions thereof may have later been surveyed and acquired as terminal grounds for the Alaska Central Railway Company.

A map introduced by plaintiff (being Exhibit #1 of Testimony of W. H. Whittlesey) shows that there were five wharf sites designated on said map, at various points around the head of Resurrection Bay.

In the spring and early summer of 1903 the funds of the Alaska Central Railway Company were at a very low ebb. It seems that John E. Ballaine and other members of the board of trustees had made strenuous efforts to raise money to finance said company, but the financial condition of the country was such that it was impossible to raise funds. At this time some of the trustees were ready to give up attempting to finance the company. Mr. Heinze had withdrawn, saying it was impossible to raise the money. John E. Ballaine seemed to be the only one with optimism enough to continue his efforts.

In the month of June or July, 1903 he called to the

attention of all the trustees of said Alaska Central Railway Company except Mr. Heinze, who had ceased to act, and Senator Turner, who was absent from the United States, the fact that land for a townsite should be located and title acquired from the United States on Resurrection Bay, from which said railroad was projected.

The undisputed testimony shows that the defendant John E. Ballaine desired the Railway Company to take up this townsite, then claimed by Mary Lowell, as part of the railway property. This the board of trustees declined to do, for two reasons: First, James A. Haight, one of the members of said board of trustees, who was an attorney-at-law, gave it as his opinion that it was very doubtful if the Railway Company could hold or acquire title to any lands except such as were actually necessary for the conduct of its business, to wit, depot, station and terminal grounds. The second reason was, that the said trustees felt that the taking up of said land was speculative and there were no funds with which to pay the expenses thereof. John E. Ballaine then asked if any of the board of trustees cared to go in with him or become interested in the location and patenting of said land for a townsite, and no one of said board of trustees desiring so to do, the said John E. Ballaine then announced that he would take it up himself, individually, and there was no objection made on the part of any of said board of trustees.

On August 1, 1903 John E. Ballaine sent his brother, Frank L. Ballaine, to Seward, Alaska, where he arrived about August 12th and immediately pro-

cured relinquishment from Mary Lowell to her homestead covering the land in controversy. Frank L. Ballaine then caused a survey to be made of the land and left for Sitka and Juneau where he made application in the Surveyor-General's office and the United States Land Office for official survey and patent for said land under soldiers additional homestead scrip, which John E. Ballaine on July 20, 1903 had procured from John M. Rankin of Washington, D. C., paying him \$2,000 therefor out of his own funds.

On August 11, 1903, the Tanana Construction Company was organized under the laws of the State of Washington by Robert B. Evans, John Dowdle, A. W. Swanitz, John E. Ballaine and James A. Haight for the purpose of taking a contract from the Alaska Central Railway Company to build its railroad.

About August 20th John E. Ballaine, accompanied by Col. A. W. Swanitz, John Dowdle, Robert B. Evans, and others left Seattle for Resurrection Bay. They met Frank L. Ballaine at Juneau and he told his brother, John E., what he had done with regard to getting the relinquishment of Mary Lowell for said homestead. The said party arrived at Resurrection Bay on August 28th. On September 2, 1903 John E. Ballaine gave to said Mary Lowell a note for \$4,000, payable nine months after date, without interest, signed by the Seward Townsite Company by John E. Ballaine, President.

Both John E. Ballaine and Frank L. Ballaine testified that at that time they were copartners in

said townsite and expected to carry it on under the name of the Seward Townsite Company.

Said Dowdle became dissatisfied with the situation and he, together with John E. Ballaine and Colonel Swanitz, left Seward about the 10th of September for Seattle.

The financial affairs of the company were again at a low ebb, when Colonel Swanitz succeeded in enlisting the aid of the Shedd Brothers of Chicago, who undertook to finance the Railway Company.

In the spring of 1904 Colonel Swanitz, as chief engineer, came out to Seward, together with one Elbridge R. Keeler, who was the treasurer of said Tanana Construction Company, and directly responsible to the Shedd Brothers. He paid out all of the moneys for the railroad work being done by the Tanana Construction Company and on June 2, 1904, the said Lowell note for \$4,000 was presented to him and he was asked to pay the same. At that time John E. Ballaine was absent from Alaska and there was no bank in Seward and no cable or telegraph line running into Seward. Frank L. Ballaine at this time was also absent from Seward. Mr. Keeler told the holders of said Lowell note that said note must be paid by John E. Ballaine, that neither the Alaska Central Railway Company nor the Tanana Construction Company had anything to do with it. The one who presented the note, being some relative of Mrs. Lowell's, was very insistent that the note be paid. Mr. Keeler then told him that he would have to wait until Colonel Swanitz, who was the chief engineer and practically in charge of the enterprise in Alaska,

returned to Seward. A few days thereafter Colonel Swanitz returned and Mr. Keeler took the matter up with him. Colonel Swanitz a witness for plaintiff, testified that inasmuch as Frank L. Ballaine had given a deed to the said land and put it up as collateral security with the Shedd, as part of the security in consideration of which they had advanced the money to finance the railroad, that he considered it was protecting the Shedd to see that the note was paid. He therefore advised Keeler to pay it and Keeler did so, with funds in his hands belonging to the Tanana Construction Company, upon Colonel Swanitz O. K.-ing the voucher and Keeler charging the said \$4,000 to himself as trustee. Upon Frank L. Ballaine's return a week or two later, he, at the request of Mr. Keeler, also O. K.-ed or approved the voucher paying said note. John E. Ballaine was advised of this action in paying said note and about three months later, he paid said sum of \$4,000 out of his own funds, into the Washington Trust Company, to the credit of the Tanana Construction Company. Later the note given the Shedd Brothers, Chicago, by the Ballaines and others, to secure the money advanced by the Shedd to finance the railroad enterprise, was paid and the said deed for said townsite returned to Frank L. Ballaine.

There was a good deal of documentary evidence with reference to the dealings between Dowdle, Shedd Brothers, and later with one A. C. Frost, who afterwards became largely interested in said railway enterprise. This great mass of testimony does not tend to throw much light, if any, upon the contro-

versy. It does show that John E. Ballaine at all times took an active part in promoting the said Alaska Central Railway Company and its construction, and it is not an unfair inference that he, as the originator and promoter of such enterprise, not only had a pride and interest in its success, but also sought to protect his own interest in said townsite, as the success of the railway enterprise would necessarily mean the success of his venture and investment in said townsite.

The witness John Dowdle, on the part of the plaintiff, who is shown to have some personal feeling against John E. Ballaine, testified that before leaving Chicago in August, 1903, Colonel A. W. Swanitz being present, John E. Ballaine told said Dowdle that the Alaska Central Railway Company owned the townsite of Seward. This is positively denied by Mr. Ballaine and Colonel Swanitz, also a witness for plaintiff, testified that he never heard or heard of any such conversation, but that on the contrary John E. Ballaine at all times claimed he owned the said townsite.

Of the original trustees of said Alaska Central Railway Company Dickinson, Caine and McGraw are deceased. There is testimony showing that at different times they each received some ten lots from John E. Ballaine in said Seward townsite. Counsel for the plaintiff lays great stress upon this as evidence of fraud, arguing that their action was improperly influenced thereby. The undisputed testimony, however, of those present at said meeting, who are still living, to wit: J. W. Godwin, James A. Haight,

John E. Ballaine and Frank L. Ballaine, shows that this was not the case; that the trustees, acting for and on behalf of the corporation, did not feel justified in incurring the expense and in entering into what then seemed to be a more or less speculative and hazardous investment, and the doubt as to the legal right of the Railway Company to hold and own the townsite.

James A. Haight completely and satisfactorily accounts for the deeding to him of some few lots on account of services rendered by him in securing the patent to said land and performing other legal services.

The testimony of John E. Ballaine shows that at a time when he was endeavoring to finance the said railroad and finding great difficulty in selling the bonds thereof, he prevailed upon J. W. Godwin, E. E. Caine and Governor McGraw to purchase two bonds each at \$850 for each thousand dollar bond and agreed to give them as a bonus ten lots each in the townsite of Seward. The undisputed testimony further shows that the said lots were in a rather remote portion of the town of Seward and had little or no value then except a purely speculative one, and have little or no value now except a purely speculative one.

There were some printed circulars or prospectuses introduced in evidence by plaintiff, some published as early as the summer of 1902, setting forth in glowing terms the wonderful resources of Alaska and the opportunity there was for a profitable investment. The first one of these prospectuses was issued probably in June, 1902, for the following is found near the end thereof:

“Supplemental—July 1, 1902. Since the publication of this prospectus, all five of the surveying parties to make the permanent survey for the Alaska Central Railway have been sent and are at work. They will finish before November 1. A sixth party, to begin cross sectioning, will be sent within a few days. The company will immediately proceed to locate a terminal townsite on Resurrection Bay, and other townsites along the route, all of them in the name of the company, the profits from which will accrue to the stockholders *pro rata*.”

There is no evidence of any wilful misrepresentation and it is not to be presumed that the men whose names appear on this prospectus were guilty of any intentional fraud or imposition. At that time it was no doubt the intention to acquire a townsite on Resurrection Bay. John E. Ballaine testifies so himself and that up to as late as July, 1903 he endeavored to have the Alaska Central Railway Company, through its duly authorized officers, take up said townsite, and in this he is fully corroborated by other witnesses and in no manner disputed. This statement, in the prospectus together with the Keeler voucher showing the payment of this \$4,000 to Mrs. Lowell, no doubt was largely responsible in causing those who brought this action to believe that they could make out a case against the Ballaines.

Counsel for plaintiff is strenuous in his contention that a great wrong was perpetrated upon those who purchased stock in the Alaska Central Railway Company by reason of this statement in the prospectus.

Unfortunately, this is not the only statement in the prospectus which is somewhat exaggerated and overdrawn, but it is one of the unfortunate things about promotion enterprises that 'glittering promises and inducements are held out to those who might purchase stock. It may be that those who issue it believe in the truth of the statements, but it too often happens that such statements are not either conservative or strictly truthful, however much the enthusiasm of the promoters may lead them to believe it. In this case, however, the undisputed testimony shows that about the year 1905, one A. C. Frost came into control of the said enterprise; that he and his associates bought up all of the stock that had been sold which they could find and that nearly all those who had bought stock sold same back to Frost and his associates at a profit.

It is not claimed that Frost or any of his associates were ever deceived into believing that said townsite belonged to the Railway Company and no presumption to that effect can be indulged.

The Testimony shows that the Ballaines deeded to the Alaska Central Railway Company all necessary right of way through the townsite for railway purposes, also a tract of about seven acres for depot grounds and a number of lots for office and other building purposes. These deeds were accepted by the Alaska Central Railway Company and upon the transfer of all this property to the plaintiff, the Alaska Northern Railway Company, the latter company received and accepted the same.

The Alaska Central Railway Company, when it

filed its plats and profile of its official survey, located and acquired from the government certain tracts and riparian rights adjacent to the land in controversy.

Before the plaintiff could succeed in an action of this kind, it must sustain the allegations of its complaint by a clear and convincing proof. This it has wholly failed to do. It has completely failed in its allegation that the soldiers additional homestead scrip was paid for by funds other than those belonging to John E. Ballaine. The \$4,000 was paid Mrs. Lowell on the responsibility of Mr. Keeler himself, as he testifies, not by request or procurement of John E. Ballaine or Frank L. Ballaine, and was repaid by John E. Ballaine. The plaintiff, however, still contends that the fiduciary relations of both John E. and Frank L. Ballaine to the Alaska Central Railway Company and the Tanana Construction Company were such that they could not acquire interests adverse to or prejudicial to the rights of the said company, assuming that the acquiring of said townsite was adverse to the Railway Company. While it is true that fraud will never be presumed, but must be proved by clear and unambiguous evidence, yet this rule is sometimes modified in cases where one holding a fiduciary relation takes advantage of such position to acquire benefits for himself, which ought in equity and good conscience belong to the person or corporation toward whom such fiduciary relationship exists, and the acts of such persons will be scrutinized very closely before they will be permitted to acquire such interests.

I have considered this case, however, very carefully

and I am satisfied that there is nothing in the conduct of John E. Ballaine or Frank L. Ballaine in this case that savors in any manner of unfairness, deception or taking advantage of the Alaska Central Railway Company or the Tanana Construction Company, or acquiring property adverse to the interest of or prejudicial to said railway company. There is not a particle of proof that either John E. or Frank L. Ballaine were charged with the duty of locating or acquiring townsites or other lands for said railway company, and presumably its chief engineer, or locating engineers, were employed to perform such duties.

The said Railway Company, through the only officers through whom it could act, refused to take said townsite, although John E. Ballaine desired and requested them to do so. At that time, in addition to the lack of funds, they were aware that there was a legal doubt as to the right of the railway to hold land for speculative purposes, and if they were familiar with public land matters, they may have known that there were other difficulties and objections in seeking to acquire title to such lands. The history of such cases in Alaska has been that one seeking to acquire title to lands which are supposed to have some speculative value, has had to contend with jumpers and holdups and claims of many kinds; that their claims may be and often have been rejected by the government, and their application for patent be refused, and this after the expenditure of much time and money. It might well have been that had the Railway Company sought to take over and acquire title

to this land, that it would have been a matter of great loss and expense to the company. They may have had to contend with jumpers and squatters, lawsuits and protests filed against their application for patent, so they never could have acquired title. This is one of the risks that the Ballaines ran in undertaking to acquire title to this land. Furthermore, at the time that the Ballaines took up this land, the Railway Company might have acquired other land, a distance anywhere from a mile to ten miles therefrom, where dock sites had been mapped out and platted in 1902. One or more rival townsites might have sprung up and with the expenditure of money by the promoters, might have succeeded in causing the town to build elsewhere than where it did.

Counsel for the plaintiff is very earnest in his insistence that because there were no minutes kept of the meeting of the board of trustees at the time they talked over the matter of the townsite with John E. Ballaine in July, 1903, that it is evidence of a secret plot or conspiracy on the part of the board of trustees to defraud the stockholders of the company, and turn over the townsite to Ballaine, who afterwards rewarded them by giving them lots. The lips of three of these trustees are closed in death. This is one of the reasons why stale demands are not favored in law. Those living testify there was absolutely no thought of such a thing, and the witness John E. Ballaine when interrogated as to why no such minutes were kept, pertinently replied, that "They kept minutes of what they did, not of what they did not do." This seems a reasonable explanation and no presumption of fraud will be indulged in this respect.

This is one of those cases where the personal interest and bias of those claiming with the plaintiff draw such conclusions from the facts as will tend to bolster up and confirm their case, and their suspicions.

“All seems infected, that the infected spy;
As all looks yellow to the jaundiced eye.”

To the impartial and unprejudiced mind, fully informed as to all the facts and circumstances surrounding this case, there can be but one conclusion—that the plaintiff has signally failed to sustain the allegations of its complaint.

Counsel for the plaintiff in his brief cites Seacoast R. Co. vs. Wood, 65 N. J. Eq. 530, footnote page 184 of 39th Volume of CYC., as follows:

“Where a contractor, in purchasing lots for building a railroad, bought certain lots for terminal purposes in the same manner that he purchased the right of way and built the road as projected, so as to embrace and enter the terminal which thus became an essential part of the road, he is precluded from asserting that the terminal properties did not become a part of the road and setting up a personal right therein.”

Plaintiff also cites the case of Trice vs. Comstock, 121 Fed. 620, as follows:

“And within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust*, principal and agent, client and attorney, employer and employee, who through

the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust*, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created."

These cases might be in point if the Ballaines had been such officers, agents or employees of the Alaska Central Railway Company or the Tanana Construction Company, as to charge them with the duty of locating, purchasing or acquiring lands for either of said companies. But there is no testimony in this case to that effect. The clear preponderance of the testimony shows that while both Frank L. and John E. Ballaine were directors or members of the board of trustees of the Alaska Central Railway Company and the Tanana Construction Company, they had no control over the funds of either; and each of said companies had on its board of directors or trustees, men of unquestioned business standing and integrity, who were not dominated or controlled by the Ballaines.

Plaintiff further cites in his brief the 39th volume of CYC., pages 191 and 192 as follows:

“The burden of proving fraud, actual or constructive, necessary to give rise to a constructive trust is upon the person alleging the existence of such a trust. But where a *prima facie* case of constructive fraud is made out from the fiduciary relationship of the parties and other circumstances connected with the transaction, the burden of affirmatively proving good faith is upon the party denying the existence of the trust.”

This is no doubt a correct statement of the law. I have carefully considered the question as to the burden of proof and feel satisfied that even though the burden of proof were shifted to the defendants to explain their actions, that they have fully and satisfactorily done so by a clear preponderance of the testimony.

There are some side issues which were introduced in this case, which it is unnecessary to discuss, as it would not tend to make clear but rather complicate and confuse the main issue. The salient and essential features of the case have been above set forth, and I can reach no other conclusion than that the plaintiff take nothing by this action, and the plaintiff's complaint be dismissed, as well as the complaints in intervention. Findings and decree may be prepared accordingly.

Dated at Seward, Alaska, this 1st day of November, 1915.

FRED M. BROWN,
Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 1, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. S-2, page No. 91.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a
Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN E. BAL-
LAINE, FRANK L. BALLAINE, et als.,

Defendants,

and

E. A. SHEDD and C. B. SHEDD, Copartners Doing
Business Under the Firm Name of E. A.
SHEDD & COMPANY, J. P. THOMPSON,

Intervenors,

J. H. MACKLIN and INTERNATIONAL ASSETS,
LTD.,

Substituted Intervenors.

**Findings of Fact and Conclusions of Law in Alaska
Northern Ry. Co. vs. Alaska Central Ry. Co., No.
720, District Court, Territory of Alaska, Third
Division.**

This action coming on for trial at the Special

Seward November, 1915, Term of the above-entitled court, and having been tried upon its merits before the Court, plaintiff being represented by T. C. West, Esq., and L. L. James, Jr., Esq., J. H. Macklin and International Assets, Ltd., substituted intervenors for J. P. Thompson and E. A. Shedd & Co., were also represented by T. C. West, Esq., and L. L. James, Jr., Esq., and the defendants, John E. Ballaine and Frank L. Ballaine, being represented by S. O. Morford, L. V. Ray and James A. Haight, their counsel of record, and the Court having heretofore, to wit: on the 1st day of November, 1915, in open court, made and entered its order in said cause ratifying, adopting and confirming all and every the proceedings of whatever nature or description had and done at a hearing held on October 20th, 21st, 22d, 23d, 25th, 26th, 27th and 28th, pursuant to stipulation therefor, said order of ratification having by its terms declared all proceedings had pursuant to said stipulation to be of the same force and effect as if the same had in fact been produced, taken and had in open court, and were declared to be by said Court binding and controlling upon all the parties, and including said substituted intervenors, to wit: J. H. Macklin and International Assets, Ltd., and by said order said Court sets forth that "said cause now stands upon the records of this court as having been fully and completely tried and presented, now awaiting the determination and decision of this Court"; and thereafter, in open court, on said 1st day of November, 1915, the Judge of the above-entitled court did announce its decision upon all matters of

equity, law and fact theretofore presented as aforesaid in favor of defendants Ballaine and against plaintiff, and did in said opinion so rendered order that findings and decree in said cause be prepared in accordance with such decision; now, therefore, the Court, being fully advised in the premises, does hereby make and order entered its findings of fact and conclusions of law deduced therefrom as follows, to wit:

THE COURT FINDS:

1. That the plaintiff, Alaska Northern Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has been engaged in the business of constructing and operating a railroad in the Third Division of the Territory of Alaska, and that plaintiff has complied with all laws applicable to Alaska relative to and governing foreign corporations doing business in Alaska.

2. That prior to the year 1904, the Alaska Central Railway Company, one of the defendants above named, was duly and regularly organized and formed under the laws of the State of Washington, and thereafter until about the month of October, 1909, carried on a general railroad business within the Third Division of the Territory of Alaska.

3. That the plaintiff corporation was formed for the purpose of acquiring, and in about the month of October, 1909, by proceedings duly and regularly had, did acquire all the assets of said Alaska Central Railway Company in said Territory of Alaska, and

the plaintiff has ever since been and now is the owner thereof.

4. That the defendants, John E. Ballaine and Frank L. Ballaine, in the year 1902, became associated together as copartners engaged in certain business ventures, which said relation as copartners continued up to on or about the first day of June in the year 1912.

5. That the Alaska Central Railway Company, corporation aforesaid, was organized March 31, 1902, and its first board of directors or trustees consisted of G. W. Dickinson, E. E. Caine, Charles L. Denny, J. W. Godwin, John E. Ballaine, George Turner, Charles F. Peck and John H. McGraw; the said Peck and Denny, however, failed to qualify or serve as such trustees and later, F. Aug. Heinze and James A. Haight were selected to take the places of said Denny and Peck, and said company was organized for the purpose and object of constructing a railroad from the head of Resurrection Bay, Territory of Alaska, to some available point on the Yukon River in said Territory; and, in the carrying out of the objects and purposes of said railroad company, certain employees of said company through its engineering department caused to be staked and located by means of alleged mineral locations, alleged trading site locations and other devices, the entire waterfront of Resurrection Bay from Lowell Point on the westerly side thereof to 4th of July Creek on the easterly side thereof, extending over and embracing an approximate distance of twelve miles along the shore of said Bay.

6. That in the spring and early summer of the year 1903, the funds of the Alaska Central Railway Company were at a very low ebb; the defendant, John E. Ballaine, and other members of the board of trustees had failed, after strenuous efforts, to raise money to finance said company, and one of said trustees, Mr. Heinze, had withdrawn from the company by reason of such fact, and Senator Turner of said trustees was in London, England, as a member of the Alaska Boundary Tribunal.

7. That in the month of June or July in the year 1903, the defendant, John E. Ballaine, urged upon the board of trustees of said Alaska Central Railway Company that said company should take some steps toward acquiring certain property located at and near the head of said Resurrection Bay, commonly described as the "Lowell Homestead"; and that said board of trustees, however, declined to take any steps toward the acquisition of said property, and that at a meeting of the board of trustees of said company at which were present John H. McGraw, G. W. Dickinson, E. E. Caine, J. W. Godwin, James A. Haight, Frank L. Ballaine, and John E. Ballaine said trustees determined to not enter upon the acquisition for the corporation of land speculative in value; and the defendant, John E. Ballaine, then endeavored to secure the co-operation of anyone, or all, of said trustees, individually, to become interested with him in acquiring the land embraced in the said Lowell Homestead location, located at the head of Resurrection Bay as aforesaid, but, that all and every of said trustees declined and refused to take

any part in said projected venture, and acquiesced in and made no objection to the proposal of said defendant, John E. Ballaine, to personally enter upon said venture.

8. That on August 12, 1903, at Seward, Alaska, the defendant, John E. Ballaine, through his brother and copartner, Frank L. Ballaine, procured in writing a relinquishment from said Mary Lowell, whereby she did relinquish to the United States Government her rights in and to the tract of land so held by her as a homestead, and that said relinquishment so procured was, together with the surveyor's field-notes of said tract, filed in the office of the Surveyor-General of the Territory of Alaska on or about August 19, 1903, and thereafter, on December 7, 1903, application to enter said tract under soldiers' additional homestead scrip was made at the U. S. Land Office at Juneau, Alaska, by the defendant, Frank L. Ballaine.

9. That the defendant, John E. Ballaine, paid from out of his own personal funds on July 20, 1903, the sum of two thousand and no/100 dollars (\$2,000.00) for the soldiers' additional homestead scrip so used in connection with the application of the said Frank L. Ballaine for the land contained in surveys Nos. 726 North and 726 South, which said surveys included and covered the tract of land the right to which was relinquished by the said Mary Lowell to the United States Government as aforesaid.

10. That the defendant, Tanana Construction Company, was organized on August 11, 1903, pursu-

ant to and under the laws of the State of Washington as a corporation, its first board of trustees being composed of John Dowdle, Robert B. Evans, A. W. Swanitz, James A. Haight and John E. Ballaine, and was formed for the purpose of constructing the Alaska Central Railway under contract therefor.

11. That the defendant, John E. Ballaine, at all times prior to and during the organization of the Tanana Construction Company claimed to own and so stated to the trustees of said Tanana Construction Company, to wit, John Dowdle, Robert B. Evans and Alexander W. Swanitz that he, the said Ballaine, was a majority owner of the lands embraced in the Seward townsite.

12. That the board of trustees of the Tanana Construction Company were not subject to or under the control and domination of either of the defendants Ballaine, and that the Tanana Construction Company was independent of and not controlled by the Alaska Central Railway Company or by those who controlled the Alaska Central Railway Company, such corporations having separate officers, offices, stockholders and management, and in this regard the Court further finds that the Alaska Central Railway Company was controlled and managed by its President, George W. Dickinson, a man of extensive railroad experience and possessed of strong and positive characteristics.

13. That the Tanana Construction Company in 1904 under its contract with the Alaska Central Railway Company commenced to construct the first twenty-one miles of the Alaska Central Railway,

A. W. Swanitz being chief engineer and having the active management and control of said construction, and Elbridge R. Keeler being treasurer of said company and having sole and absolute control of the funds of said Company during said period.

14. That on February 2, 1904, the said Tanana Construction Company negotiated with E. A. Shedd & Company of Chicago a loan in the sum of two hundred thousand and no/100 dollars (\$200,000.00) for the purpose of constructing and building said twenty-one (21) miles of railroad, and as security for the repayment of said loan, hypothecated to the said Shedd's advance issue of bonds made by the Alaska Central Railway Company to cover the construction of said twenty-one miles theretofore delivered to said Tanana Construction Company to aid it in the prosecution of its construction contract, and that also at said time the defendant, John E. Ballaine, did put up and pledge as collateral security a deed from Frank L. Ballaine of all the lands embraced in said townsite, save and except for certain blocks of lots therein situated, to one Castle as trustee, and that said Seward townsite so placed as collateral as aforesaid was acknowledged by the Tanana Construction Company by Robert B. Evans, by Alexander W. Swanitz, by John Dowdle and James A. Haight to be owned and actually belonging to the said defendant, John E. Ballaine.

15. That at the time of the securing of said loan from A. E. Shedd & Company by the Tanana Construction Company and the depositing of the collateral described in the foregoing finding as security

for such loan on February 1st, 1904, all of the stockholders of the Tanana Construction Company signed a contract with John E. Ballaine recognizing and acknowledging the Seward townsite to be the property of John E. Ballaine, and said contract between the stockholders of the Tanana Construction Company and said defendant, John E. Ballaine, provided further that in consideration of the fact that said Ballaine had put up his individual property, the Seward townsite, as part collateral that said Ballaine should have the right himself to pay all of the sum of fifty thousand and no/100 dollars (\$50,000.00) additional to the Shedd loan of two hundred thousand dollars, in case the other stockholders of the Tanana Construction Company failed to raise their *pro rata* of said fifty thousand dollars.

16. That the stockholders of the said Tanana Construction Company failed to raise any part of the sum of fifty thousand dollars required to be raised by said stockholders under the terms of the Shedd contract, and the said defendant, John E. Ballaine, did raise all of said sum of fifty thousand dollars and paid it in to the order of E. A. Shedd as in the Shedd contract provided, whereupon, the said John E. Ballaine became the owner of all the stock of said Tanana Construction Company.

17. That in the month of December, 1904, the terms of the contract between said E. A. Shedd & Company and said Tanana Construction Company were fully complied with, payment of the sum loaned duly made, and all collateral security theretofore pledged to secure said loan was released, including

said lands embraced in Seward townsite, and the same were by deed reconveyed to the said Frank L. Ballaine by the said Castle, trustee aforesaid, and thereafter duly made of record in the office of the *ex-officio* Recorder of Kenai Precinct at said Seward, Alaska, and the control of the said Alaska Central Railway Company became vested in the hands of one A. C. Frost and associates.

18. That one Elbridge R. Keeler, the treasurer of said Tanana Construction Company, was by the terms of the Shedd contract hereinbefore referred to special disbursing officer and a special representative of the said E. A. Shedd & Co. at Seward, Alaska.

19. That on June 2d, 1904, payment of the sum of four thousand and no/100 dollars (\$4,000.00) to the said Mary Lowell as part consideration for the relinquishment by her heretofore given was made by one Elbridge R. Keeler, said consideration of four thousand dollars at said time being evidenced by a note made payable to the said Mary Lowell in said sum of four thousand dollars, payable nine months after date, dated September 2d, 1903, and signed by the Seward Townsite Company by John E. Ballaine, President, said Seward Townsite Company being a style of copartnership name under which the defendants, John E. Ballaine and Frank L. Ballaine, expected to carry on business matters connected with said entry; that thereafter, the said John E. Ballaine paid to the said Elbridge R. Keeler the said sum of four thousand dollars so advanced by said Keeler in payment of said note as aforesaid, and that said four thousand dollars so repaid to said Keeler

as aforesaid by the said Ballaine was paid out of and from personal funds belonging to and owned by the said defendant, John E. Ballaine.

20. That the said Elbridge R. Keeler in so advancing the said sum of four thousand dollars in payment of the said Lowell note acted upon his own responsibility after consultation with the said A. W. Swanitz, and that the Court finds that the payment by said Elbridge R. Keeler of said sum of four thousand dollars on account of said note was made for the express purpose of protecting Shedd & Company in respect to the Seward townsite lands then held by Shedd & Company as collateral security from John E. Ballaine, individually, for the payment of the loan of two hundred thousand dollars made in accordance with their contract of February 1, 1904, to the Tanana Construction Company.

21. The Court further finds that the payment of said sum of four thousand dollars by the said Elbridge R. Keeler from the funds of the Tanana Construction Company and E. A. Shedd & Company in payment to Mary Lowell as part consideration for the relinquishment by her of her said homestead entry was by said Keeler made without the knowledge or authority of the said John E. Ballaine or of the said Frank L. Ballaine.

22. That the defendant, John E. Ballaine, and the defendant, Frank L. Ballaine, or either of them, never at any time diverted any funds of the Alaska Central Railway Company or the Tanana Construction Company, and never at any time had the funds of either of said companies under their control.

23. That the plaintiff has wholly failed to prove the allegation in its complaint to the effect that the defendant, John E. Ballaine, while an officer and trustee of the Alaska Central Railway Company, or at any time, was in the possession either personally or by those under his immediate control and direction of large sums of money belonging to the said Alaska Central Railway Company, or at all, and plaintiff has wholly failed to prove its allegation that the defendant, John E. Ballaine, while acting in his capacity as an officer and trustee of said Alaska Central Railway Company, unlawfully, without the knowledge and consent of said corporation, diverted the sum of three thousand and no/100 dollars (\$3000.00) of the funds of said corporation, and purchased therewith soldiers additional homestead scrip, which he used for the purpose of locating the townsite of Seward aforesaid, or at all; and plaintiff has wholly failed in its proof to sustain its allegation that in about the month of June, 1904, or at any time the defendant, John E. Ballaine, did fraudulently and without the knowledge or consent of the said Alaska Central Railway Company divert the sum of four thousand dollars of the funds of said corporation with which to purchase certain releases from Mary Lowell of the lands comprising a portion of the townsite of Seward, or at all, and further, that the plaintiff has wholly and absolutely failed to prove its allegation that said funds so alleged to belong to said Company and so alleged to have been unlawfully diverted were used and diverted by the said defendant, John E. Ballaine, in

pursuance of a fraudulent scheme to defeat and defraud said Railway Company, and further, that the plaintiff has wholly failed to prove its allegation that the issuance of United States patents for the lands embraced in said townsite were issued in fraud of rights of the plaintiff, of the defendants, Alaska Central Railway Company, Tanana Construction Company, or the intervenors named in this action, or of any person or persons whomsoever.

24. That the defendants, Frank L. Ballaine and John E. Ballaine, were the owners (John E. Ballaine two-thirds, Frank L. Ballaine one-third) on the 20th day of May, 1905, and were entitled to the possession of all the lands comprised in said townsite of Seward hereinbefore mentioned and described as follows, to wit:

Beginning at Corner Number One, being the northeast corner of Survey No. 726 North; a granite stone monument, marked "Cor. 1, S. 726 N."; thence south along the east line of Survey No. 726 N. 24.83 chains to the southeast corner of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2"; thence west parallel with the north boundary of said Survey No. 726 N., 32.21 chains to the southwest corner of said Survey No. 726 N., being Corner Number Three of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 3"; thence north along the west line of said Survey No. 726 N., 24.83 chains to Corner Number Four of said Survey No. 726 N., being the northwest corner of said Survey No. 726 N., a granite stone

monument marked "Cor. 4, S. 726 North"; thence east along the north line of said Survey No. 726 N., 32.21 chains to place of beginning, containing seventy-nine acres and ninety-eight one-hundredths of an acre; the patent to the above described premises being dated May 20, 1905.

Beginning at Corner No. 2 of Survey No. 726 N., in the District of Alaska, a granite stone monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the northeast corner of said Survey No. 726 S., in the District of Alaska; thence south along the east line of said Survey No. 726 S. 17.17 chains to Corner Number Two of said Survey No. 726 S., which is 2.87 chains south of Witness Corner to said Corner No. 2 of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S. Cor. 2, W. C."; thence from corner Number Two of said Survey No. 726 S., following the meander line of said Survey No. 726 S., as follows: South forty-five degrees west 3.10 chains, south sixty-eight degrees forty-five minutes west 4.30 chains, west 2.80 chains, south sixty-six degrees thirty minutes west 10.30 chains, south sixty degrees west 8.10 chains, south fifty-five degrees west 6.40 chains, south seventeen degrees fifteen minutes west 5 chains to Corner Number three of said Survey No. 726 S., being 0.67 chains south of witness corner to Corner Number Three of said Survey No. 726 S., which witness corner is a granite stone

monument marked "S. 726 S., Cor. 3, W. C."; thence from said corner Number Three of said Survey No. 726 S. north along the west line of said Survey No. 726 S., 37.50 chains to the north-west corner of said survey No. 726 S., being Corner Number Three of said Survey No. 726 N., and marked "S. 726 N. Cor. 3," also marked "S. 726 S. Cor. 4"; thence east along the south line of said Survey No. 726 N., being the north line of said Survey No. 726 S. 32.21 chains to place of beginning, containing seventy-nine acres and ninety-seven and one hundredths of an acre.

The patent to the above described premises being dated May 1, 1905. Each of said two patents are now of record in the office of the U. S. Commissioner and ex-officio Recorder of the Kenai Recording Precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

and have been in the lawful possession thereof since said 20th day of May, 1905, and since the 12th day of August, 1903, the date of relinquishment by said Mary Lowell of her right in and to said land, and now are the owners, both in law and equity, of said premises, and the possession of the said John E. Ballaine and Frank L. Ballaine in and to said premises in question, except and save as to those certain lots, tracts or parcels of land by them conveyed by deed to sundry persons, has been actual, continuous, open, notorious, uninterrupted, and adverse under

claim and color of right and title, adverse to all the world.

25. That the plaintiff has wholly failed to prove that the lands described in the foregoing finding are charged with and subject to a trust in favor of the plaintiff, the defendant, Alaska Central Railway Company, the defendant, Tanana Construction Company, the intervenors or substituted intervenors, or that the legal title to said lands or any portion thereof was held by either or both said defendants, Ballaine, in trust for the use and benefit of the plaintiff, said defendants and intervenors hereinbefore named or of any person, persons, natural or artificial, whomsoever.

26. That plaintiff has wholly failed to prove that the defendant, Frank L. Ballaine, has been and still is or was ever a dummy alleged owner of the townsite of Seward; that the plaintiff has wholly and absolutely failed to prove that the defendants, John E. Ballaine and Frank L. Ballaine, hold the title to the real property located in the townsite of Seward, so-called, for and on behalf of the plaintiff, and has wholly, entirely and absolutely failed to prove that the said John E. Ballaine and Frank L. Ballaine are, and each of them is, a trustee *ex malificio* for and on behalf of the said plaintiff.

27. That the said plaintiff has wholly failed to submit proof of its allegation that the defendant, John E. Ballaine, acting for himself and through his brother and copartner, Frank L. Ballaine, took advantage of the objects and plans of the Alaska Central Railway Company, attempted to and did

secure the title in the name of the said Frank L. Ballaine to the said townsite in violation of the trust of the said John E. Ballaine towards said Alaska Central Railway Company, but, on the contrary, the court finds that the undisputed testimony in the case shows that in the month of June or July in the year 1903, the defendant, John E. Ballaine, strongly urged upon the directors and trustees of the Alaska Central Railway Company that they acquire and take steps to acquire the land embraced in the Mary Lowell homestead tract, situated at the head of Resurrection Bay, Alaska, but that said trustees refused to risk the funds of the company, for the experiment of investing in land for speculative purposes, it being doubtful as to the right of said railway company to acquire lands other than those necessary for its corporate business; and all the other trustees not only refused to join the defendant, John E. Ballaine, in seeking to acquire title or ownership to said homestead tract, but also refused to permit the funds of the company to be invested in such experiment, and further, with full and complete knowledge of the entire matter and possessing all of the knowledge which the defendant, John E. Ballaine, then possessed with reference to the said homestead tract, expressly acquiesced in its attempted acquisition by John E. Ballaine; the Court further finds that there was no concealment, fraud, artifice or deception attempted or practiced on the part of the defendants, John E. Ballaine or Frank L. Ballaine, or by and upon the part of said board of trustees; and further, that said trustees and said defendants

Ballaine acted honestly within the powers conferred upon them as such trustees, and not in fraud of the the rights of the stockholders or creditors of such corporation, but was an action taken on the part of said board of trustees in good faith and with diligence and fairness, having due regard to the interests of said Alaska Central Railway Company and the interests of its stockholders, and further, that the defendants Ballaine were in no manner charged with the duty of locating or acquiring townsites or other lands for said Alaska Central Railway Company.

28. The Court further finds that until April 29th, 1915, the date of filing complaint in this action, no claim either legal or equitable was ever asserted in and to the property designated as the Seward townsite by the plaintiff, Alaska Northern Railway Company, by the defendant, Alaska Central Railway Company, by the defendant, Tanana Construction Company, by the intervenors or substituted intervenors, or by any person or persons, natural or artificial, or at all.

29. That in certain foreclosure proceedings heretofore had in this court relative to the property of the Alaska Central Railway Company in actions entitled "The Trusts and Guarantee Company, Limited, Plaintiff, vs. Alaska Central Railway Company, Tanana Railway Construction Company and Central Trust Company of Illinois, Defendants," and the case of "Central Trust Company of Illinois, Plaintiff, vs. Alaska Central Railway Company, The Trusts and Guarantee Company, Limited, and the Tanana Railway Construction Company, Defend-

ants," the lands embraced in said Seward townsite were not a part of the property sold under said foreclosure sale pursuant to decree, nor were said lands included in the conveyances made by Marshal's Deed in said foreclosure proceedings, nor was a sale of the property of the Alaska Central Railway Company included in said Seward townsite by said court ever approved or confirmed.

30. The Court further finds that plaintiff has failed to prove that said defendants, John E. Ballaine and Frank L. Ballaine, in the acquisition of the lands embraced in said Seward townsite as described in complaint of plaintiff, did in any manner, either in their capacity as trustees of the Alaska Central Company or as individuals through artifice, fraud, deception or otherwise, take advantage of the said Railway Company or the said Tanana Construction Company, nor did they acquire said lands adverse to the interests of or prejudicial to the rights and interests of the said Alaska Central Railway Company and Tanana Construction Company.

31. That at the time the defendants Ballaine took up the land embraced in said Seward townsite, the defendant, Alaska Central Railway Company, might have acquired other land on the shore of Resurrection Bay, Alaska, within a distance from a mile to ten miles from said townsite, where dock sites had been mapped out and platted in the year 1902 by the survey parties of the Alaska Central Railway then in the field.

32. That the defendants Ballaine, during the year 1905, conveyed to the said Alaska Central Railway

Company all necessary rights-of-way through the said Seward townsite for railway purposes, also a tract of land containing approximately seven (7) acres for depot grounds, and a number of lots for office and other building purposes, and that such conveyances, so made by said Ballaines, were accepted by said Alaska Central Railway Company, and upon the transfer of its property to the plaintiff corporation, plaintiff received and accepted the same.

33. That the Alaska Central Railway Company, by filing maps and plats of its definite location, located and acquired from the United States Government certain tracts of land and riparian rights adjacent to the land owned by the defendants Ballaine and the subject matter of this action.

34. That the plaintiff has wholly failed to prove that certain conveyances made by the defendants Ballaine to various officers and trustees of the Alaska Northern Railway Company, of the Alaska Central Railway Company and of the Tanana Construction Company were without consideration and were made to such persons by said Ballaines pursuant to and as a part of a conspiracy to defraud the Alaska Central Railway Company from its alleged interest in said Seward townsite, but that said conveyances so made to such persons were made for a valuable consideration, in good faith and fairly, without concealment, and not in fraud of the rights or prejudicial to the interests of the Alaska Central Railway Company, of the Alaska Northern Railway Company, or of their respective stockholders and creditors; and that the lots contained in such conveyances were

located in rather a remote portion of the Town of Seward and had little or no value at the date of said conveyances, except a purely speculative one, and have little or no value now, except a purely speculative one.

35. That the plaintiff has wholly failed to prove its allegations in its complaint set forth in paragraph eight thereof to the effect that when the said Alaska Central Railway Company was formed, it was formed for the purpose of acquiring and owning the townsite of Seward, Alaska; and that the said defendant, John E. Ballaine, acting for himself and through his agent and dummy, the defendant, Frank L. Ballaine, taking advantage of the objects and plans of the Alaska Central Railway Company, attempted to and did secure the title in the name of the said Frank L. Ballaine to the said townsite in violation of the trust of the said John E. Ballaine in and towards the said Alaska Central Railway Company.

36. That in about the year 1905, one A. C. Frost came into the control of the enterprises connected with the Alaska Central Railway Company, and he and his associates bought up all the stock of said Company that had been formerly sold, which they could find, and nearly all those who had originally bought stock of said Company, sold same back to Frost and his associates at a profit.

37. The Court further finds that the plaintiff has signally failed to sustain the allegations in its complaint contained, wherein it attempts to establish a trust in the defendants Ballaine of the lands embraced in said Seward townsite, for the use and bene-

fit of the plaintiff, of the defendant, Alaska Central Railway Company, the defendant, Tanana Construction Company, and the intervenors and substituted intervenors herein.

Made and ordered entered, in open court, this 9th day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

Entered Court Journal No. S.-2, page No. 133.

From the above and foregoing FINDINGS OF FACT, the Court makes and deduces the following CONCLUSIONS OF LAW.

I.

That the defendants, John E. Ballaine and Frank L. Ballaine, are entitled to a decree of this court dismissing, on the merits, the complaint of plaintiff and also the complaints in intervention, and that said defendants Ballaine do have and recover from said plaintiff their costs herein.

Let a decree be entered accordingly.

Made and ordered entered, in open court, this 9th day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 9, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 5-2, page No. 142.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 720.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a
Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN E. BAL-
LAINE, FRANK L. BALLAINE, et al.,

Defendants,

and

E. A. SHEDD and C. B. SHEDD, Copartners Do-
ing Business Under the Firm Name of E. A.
SHEDD & COMPANY, J. P. THOMPSON,

Intervenors,

J. H. MACKLIN and INTERNATIONAL AS-
SETS, LTD.,

Substituted Intervenors.

**Judgment in Alaska Northern Ry. Co. vs. Alaska
Central Ry. Co. et al., No. 720, in District Court
for the Territory of Alaska, Third Division.**

This action came on to be heard at the Special Seward November, 1915, Term of the above-entitled court, plaintiff and the substituted intervenors above named appearing by their counsel of record, T. C. West, Esq., and L. L. James, Jr., Esq., the defendants, Frank L. Ballaine and John E. Ballaine,

appearing by their respective counsel of record, S. O. Morford, L. V. Ray and James A. Haight; and the Court, having, heretofore, to wit, on the 1st day of November, 1915, in open court, made and entered its order in said cause ratifying, adopting and confirming all and every the proceedings of whatever nature or description had and done at a hearing held on October 20th, 21st, 22d, 23d, 25th, 26th, 27th and 28th, pursuant to stipulation therefor, said order of ratification having by its terms declared all proceedings had pursuant to said stipulation to be of the same force and effect as if the same had in fact been produced, taken and had in open court, and were declared to be by said Court binding and controlling upon all the parties, an including said substituted intervenors, to wit: J. H. Macklin and International Assets, Ltd., and by said order said Court sets forth that "said cause now stands upon the records of this court as having been fully and completely tried and presented, now awaiting the determination and decision of this court"; and thereafter, in open court, on said 1st day of November, 1915, said Court did announce its decision upon all the issues in said cause against the plaintiff and intervenors, and substituted intervenors, dismissing the complaint of plaintiff and the said complaint in intervention, and said court did thereafter, on the 9th day of November, 1915, make and enter in writing, its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law deduced therefrom; and the Court, being fully advised in the premises.

IT IS ORDERED, ADJUDGED AND DECREED, that the complaint of plaintiff and the complaints in intervention be, and the same are hereby ordered dismissed; and

IT IS FURTHER ORDERED that the defendants, Frank L. Ballaine and John E. Ballaine, do have and recover their costs and disbursements herein from the plaintiff.

Done in open court this ninth day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 9, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. S. 2, page No. 143.

Certificate of Judge, District Court, Territory of Alaska, Third Division, and Certificate of Clerk, District Court, Hon. Fred M. Brown, Presiding Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Frank M. Brown, Judge of the District Court for the Territory of Alaska, Third Division, the same being a court of record, having by law a seal, do hereby certify that Arthur Lang was the clerk of said court on the dates when the annexed Opinion, Findings of Fact, Conclusions of Law, and Judgment were filed in said court, and that K. L. Monahan,

whose name is subscribed to the same was at the date of said certificate a duly qualified and acting deputy clerk of said court, acting as deputy clerk to said Arthur Lang, clerk as aforesaid, and as such has authority by law to take and certify acknowledgments or proof of the execution by any person of deeds and all other instruments in writing; that I am well acquainted with her handwriting, and verily believe that the signature to said Opinion, Findings of Fact, Conclusions of Law and Judgment is her genuine signature.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of said court to be affixed, at Seward, Alaska, on this 13th day of November, A. D. 1913.

[Seal]

FRED M. BROWN,

Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, by K. L. Monahan, Deputy Clerk, the said District Court being a court of record, having by law a seal, do hereby certify that Fred M. Brown whose name is subscribed to the above and foregoing certificate, was at the date of said certificates and is now the duly commissioned, qualified and presiding Judge of said court; and that I am well acquainted with his handwriting, and verily believe that the signature to said certificate is his genuine signature.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of said court, at Seward, Alaska, on this 13th day of November, A. D. 1915.

[Seal]

K. L. MONAHAN,
Deputy Clerk of the District Court for the Territory
of Alaska, Third Division.

[Endorsed]: Plaintiff's Exhibit #1. Cause #3122. Ballaine vs. W. J. Boland et al. Adm. Sept. 17th. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By _____, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 2—Complaint and Answer in
Alaska Northern Ry. Co. vs. Alaska Central Ry.
Co. et al., No. 720, in District Court, Territory
of Alaska, Third Division.**

*In the District Court in and for the Territory of
Alaska, Third Division.*

COPY.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a
Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN E. BAL-
LAINE, FRANK L. BALLAINE et al.,
Defendants.

Comes now the above-named plaintiff and for
cause of action against the above defendants alleges
as follows, to wit:

I.

That ever since the month of October, 1909, the
plaintiff has been and now is a corporation organized
and existing under and by virtue of the laws of the
State of Washington, having its principal office in
the city of Seattle, in said State, and has been and
now is engaged in the railroad business within the
Third Judicial Division of Alaska. That said plain-
tiff has complied with the laws of Alaska enacted by
Congress governing foreign corporations doing busi-
ness in Alaska, and has complied with all of the re-
quirements of Chapter 11 of the Session Laws of
Alaska, approved April 21, 1913, and has paid its an-
nual license fee last due as provided by Section 7, of
said Chapter 11, of the Session Laws of Alaska.

II.

That prior to the year 1904, the Alaska Central
Railway Company, defendant, was duly and regu-
larly organized and formed under the laws of the
State of Washington, having its principal place of
business at Seattle aforesaid, and thereafter and
until on or about the month of October, 1909, carried
on a general railroad business within the Third Judi-
cial Division of the Territory of Alaska.

III.

That the plaintiff corporation was formed for the purpose of acquiring, and in about the month of October, 1909, by proceedings duly and regularly had, did acquire all the assets of the said Alaska Central Railway Company, including its railroad running in a northwesterly direction from the Town of Seward, in said Territory of Alaska, and all its lines, buildings, rolling stock, and all its assets of every kind and description, and the plaintiff ever since has been and now is the owner thereof.

IV.

That in and prior to the year 1905, the defendant John E. Ballaine was the duly elected, qualified and acting director, officer and trustee of the said Alaska Central Railway Company and was in possession, either personally or by those under his immediate control and direction, of large sums of money belonging to the said Alaska Central Railway Company, and while the said defendant John E. Ballaine was so acting in said capacity as director, officer and trustee of the said Alaska Central Railway Company, he did unlawfully and without the knowledge and consent of said corporation divert the sum of Three Thousand Dollars of the funds of the said corporation and purchase therewith soldiers' additional homestead scrip which he used for the purpose of locating the Townsite of Seward aforesaid, a full description of which land is hereinafter contained, and in about the month of September, 1904, did fraudulently and without the knowledge or consent of the said Alaska Central Railway Company divert the

sum of Four Thousand Dollars, of the funds of said corporation, with which to purchase certain releases from Mary Lowell of the lands comprising a portion of the said Townsite of Seward, and in pursuance of a fraudulent scheme to defeat and defraud the said Alaska Central Railway Company did contrive to have and did have the said Townsite of the said Town of Seward, Alaska, located in the name of his brother and codefendant Frank L. Ballaine, and did contrive to have the Government of the United States issue to the said Frank L. Ballaine two certain patents, one on the first day of May, 1905, and the other on the twentieth day of May, 1905, for the lands comprising the said Townsite of Seward hereinbefore mentioned, which comprises the said Townsite, and is described in the said patents as follows, to wit:

Beginning at Corner Number One, being the Northeast corner of Survey No. 726 North, a granite stone monument, marked "Cor. 1, S. 726 N."; thence South along the East line of Survey No. 726 N. 24.83 chains to the Southeast corner of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2"; thence West parallel with the North boundary of said Survey No. 726 N., 32.21 chains to the Southeast corner of said Survey No. 726 N., being Corner Number Three of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 3"; thence North along the West line of said Survey No. 726 N., 24.83 chains to Corner Number Four of said Survey No. 726 N., being the Northwest corner of said Survey No. 726 N., a granite stone monument marked "Cor. 4, S. 726 North"; thence East along

the North line of said Survey No. 726 N., 32.21 chains to place of beginning, containing seventy-nine acres and ninety-eight one-hundredths of an acre; the patent to the above-described premises being dated May 20, 1905.

Beginning at Corner No. 2 of Survey No. 726 N., in the District of Alaska, a granite monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the Northeast corner of said Survey No. 726 S., in the District of Alaska; thence South along the East line of said Survey No. 726 S. 17.17 chains to Corner Number Two of said Survey No. 726 S., which is 2.67 chains South of Witness Corner to said Corner No. 2 of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S. Cor. 2, W. C."; thence from corner Number Two of said Survey No. 726 S., following the meander line of said Survey No. 726 S., as follows: South forty-five degrees West 3.10 chains, West 2.80 chains, South sixty-six degrees thirty minutes West 10.30 chains, South sixty degrees West S. 10 chains, South fifty-five degrees West 6.40 chains, South seventeen degrees fifteen minutes West 5 chains to Corner Number Three of said Survey No. 726 S., being 0.67 chains South of witness corner to Corner Number Three of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S., Cor. 3, W. C."; thence from said corner Number Three of said Survey No. 726 S. North along the West line of said Survey No. 726 S., 37.50 chains to the Northwest corner of said Survey No. 726 S., being Corner Number Three of said Sur-

vey No. 726 N., and marked "S. 726 N. Cor. 3," also marked "S. 726 S. Cor. 4"; thence East along the South line of said Survey No. 726 N. being the North line of said Survey No. 726 S. 32.21 chains to place of beginning, containing seventy-nine acres and ninety-seven one-hundredths of an acre. The patent to the above-described premises being dated May 1, 1905. Each of said two patents are now of record in the office of the U. S. Commissioner and ex-officio Recorder of the Kenai Recording Precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

V.

That during all of the time hereinbefore mentioned the said defendant, Frank L. Ballaine, has been and still is a dummy alleged owner of the said Townsite and lands for and on behalf of the said John E. Ballaine, and holds the same for and on behalf of the said defendant John E. Ballaine.

VI.

That the said defendants John E. Ballaine and Frank L. Ballaine have entered into contracts for the sale of certain lots or portions of the said Townsite, an exact description of which is to the plaintiff unknown, with certain other persons, firms and corporations, whose names are unknown to the plaintiff herein, and are described under fictitious names of the defendants Does, and said persons, firms and corporations, designated under such fictitious names, will, unless restrained by the order of this Honorable Court, pay to the said defendants John E. Ballaine and Frank L. Ballaine the alleged purchase price of

the said lots and tracts of lands, and the same will become lost to the plaintiff herein.

VII.

That the defendants John E. Ballaine and Frank L. Ballaine hold the above-described real property aforesaid for and on behalf of the plaintiff, and are and each of them is a trustee *ex maleficio* for and on behalf of the plaintiff.

VIII.

That when the said Alaska Central Railway Company was formed it was formed for the purpose of building the said railroad and acquiring and owning the Townsite at Seward aforesaid, and the said defendant John E. Ballaine, acting for himself, and through his agent and dummy the defendant Frank L. Ballaine, taking advantage of the objects and plans and the said Alaska Central Railway Company attempted to and did secure the title in the name of said Frank L. Ballaine to the said Townsite in violation of the trust of the said John E. Ballaine in and towards the said Alaska Central Railway Company.

IX.

That at certain times and dates which are unknown to plaintiff the said defendants John E. Ballaine and Frank L. Ballaine sold and conveyed certain portions of lots out of said Townsite and received therefrom large sums of money, the amount of which is to plaintiff unknown, and the said defendants decline and refuse to account to plaintiff therefore.

X.

That the said defendants John E. Ballaine and Frank L. Ballaine deny plaintiff's claim to own the

said Townsite and all portions thereof, and refuse to acknowledge the claim of plaintiff to the ownership thereof in any form or manner; and have refused to still refuse to convey the same to plaintiff.

XI.

That the Tanana Construction Company, a corporation, was organized in or about the year 1904 under the laws of the State of Washington, having its principal office at Seattle, in said State; that said corporation was and ever since has been a dummy and creature of the said defendants Alaska Central Railway Company, said John E. Ballaine being an officer, director and trustee of both the defendants Tanana Construction Company and Alaska Central Railway Company, as aforesaid. The said defendant Tanana Construction Company claims some interest in the lands and premises hereinbefore described, adverse to the claim of this plaintiff, the exact nature of said alleged claim by said defendant Tanana Construction Company is unknown to plaintiff, but plaintiff alleges that the alleged claim of said defendant Tanana Construction Company is illegal and void as against the rights of plaintiff to said lands and premises.

XII.

That this action is brought on behalf of plaintiff and also on behalf of all other persons, firms and corporations who are creditors of the defendant Alaska Central Railway Company, and who may care to participate in this action.

WHEREFORE, plaintiff prays judgment of the Court as follows:

First: That the said defendants and each of them convey to plaintiff by good and sufficient deed the title to the said lands and premises.

Second: That a decree be entered adjudging that the defendants and each of them hold the said lands and premises in trust for the said plaintiff.

Third: That the defendant's account to the plaintiff for all moneys received and to be received for and on account of the sale of the said lands and premises, or any part or portion thereof.

Fourth: That an injunction be issued directed to the said defendants and each of them restraining them and each of them from selling, disposing of or alienating the title to the said lands and premises, or to any part or portion thereof, until the termination of this suit, and permanently thereafter.

Fifth: For such other and further relief as to the Court may seem just.

Sixth: That the plaintiff have and recover his costs and disbursements herein expended.

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Plaintiff.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 720.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a
Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN E. BAL-
LAINE, FRANK L. BALLAINE, FIRST
DOE, SECOND DOE, THIRD DOE,
FOURTH DOE, FIFTH DOE, SIXTH
DOE, SEVENTH DOE, EIGHTH DOE,
NINTH DOE, TENTH DOE, ELEVENTH
DOE, TWELFTH DOE, THIRTEENTH
DOE, FOURTEENTH DOE, FIFTEENTH
DOE, SIXTEENTH DOE, SEVEN-
TEENTH DOE, EIGHTEENTH DOE,
NINETEENTH DOE, TWENTIETH
DOE, TWENTY-FIRST DOE, TWENTY-
SECOND DOE, TWENTY-THIRD DOE,
TWENTY-FOURTH DOE, TWENTY-
FIFTH DOE, TWENTY-SIXTH DOE,
TWENTY-SEVENTH DOE, TWENTY-
EIGHTH DOE, TWENTY-NINTH DOE,
THIRTIETH DOE,

Defendants.

Separate Answer of John E. Ballaine, in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al., No. 1020, in District Court for the Territory of Alaska, Third Division.

Comes now John E. Ballaine, one of the defendants above named, and in answer to the complaint of plaintiff on file herein, states :

I.

That this defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

That this defendant admits the allegations contained in paragraph II of plaintiff's complaint.

III.

That this defendant denies the third paragraph of plaintiff's complaint, as therein set forth, and alleges the fact to be that the said plaintiff, Alaska Northern Railway Company, was formed for the purpose of acquiring and did acquire the assets of the Alaska Central Railway Company, which said assets had heretofore, on or about the first day of October, 1909, at Valdez, Alaska, been sold at receiver's sale under order of the Court, and that the lands described in plaintiff's complaint were not included in the sale then and there had by said receiver, and were not at said time, the property of the Alaska Central Railway Company, and no claim to said lands was ever asserted in said proceedings, or otherwise, or at all, by said Alaska Central Railway Company.

IV.

That this defendant denies the allegations con-

tained in paragraph IV of plaintiff's complaint, and alleges the fact to be that on and during the year 1903 this defendant and the defendant Frank L. Ballaine, then copartners, this defendant two-thirds and the said Frank L. Ballaine one-third, acquired by purchase relinquishments to the United States from one Mary Lowell, for a portion of the lands described in plaintiff's complaint, and paid to the said Mary Lowell therefor, the sum of Four Thousand (\$4,000.00) Dollars and subsequently conveyed to the said Mary Lowell thirty-seven lots in said Seward; and since said year of 1903 this defendant and the defendant Frank L. Ballaine have been in the open, notorious, continuous and lawful possession of the lands described in plaintiff's complaint, adverse to all the world, and, that during the year 1903 this defendant and the said Frank L. Ballaine, in the name of the said Frank L. Ballaine, acquired soldiers' additional homestead scrip, and filed the same upon the lands described in plaintiff's complaint, and such proceedings were thereafter had that patents were issued by the United States Government to the said Frank L. Ballaine conveying the lands in the said complaint described; that said sum of Four Thousand (\$4,000) Dollars, so paid as aforesaid to the said Mary Lowell, and the purchase price paid for said soldier's additional scrip, the costs and expenses of a survey of said lands, for advertising and all other expenses incident and usual to the securing of patent for lands from the federal government, were actually paid by this defendant solely and alone, and that not one dollar or any portion of said sums, or at

all, was ever advanced or paid on account thereof, or in any manner, by the Alaska Central Railway Company or the Tanana Construction Company, and further, that in the procuring of said patents due notice was given by posting on the land, and publication, as by the laws of the United States required, and no adverse claim was filed, asserted or claimed by said Alaska Central Railway Company or the Tanana Construction Company, or by any other person or persons, corporation or corporations whatsoever.

V.

That in answer to paragraph V of said complaint this defendant denies that the said Frank L. Ballaine was or is acting as a dummy on behalf of this defendant, but alleges the fact to be that said Frank L. Ballaine and this defendant were copartners in acquiring the title to said property.

VI.

Answering paragraph VI of said complaint, this defendant admits that said Frank L. Ballaine and this defendant have entered into contracts for the sale of certain lands included in the description of lands contained in plaintiff's complaint as they had a lawful right to do.

VII.

In answer to paragraph VII of said complaint, this defendant denies the same and each and every allegation therein contained.

VIII.

Answering paragraph VIII of said complaint, this defendant denies that the Alaska Central Railway Company was formed for the purpose of acquiring

or owning the said Townsite at Seward, Alaska, but alleges the fact to be that said Alaska Central Railway Company never at any time had any interest, claim or right to the lands embraced in said townsite, being the lands described in plaintiff's complaint, never asserted or claimed any right or interest thereto or therein or at all, save and except those certain tracts and parcels of land purchased and acquired by the said Alaska Central Railway Company from the said defendants Ballaine and conveyed to said Railway Company by deeds duly delivered by said Ballaines to said Company, and now of record.

IX.

Answering paragraph IX of said complaint, this defendant admits that the said Frank L. Ballaine and this defendant, have sold and conveyed certain portions or lots out of said townsite as they had a lawful right so to do, but denies that a demand of any sort, nature or description was ever made on this defendant, or upon the said Frank L. Ballaine, for an accounting of any money received from such sales, by said plaintiff, or at all.

X.

Answering paragraph X of said complaint, this defendant admits that said Frank L. Ballaine and this defendant own and claim to own the said townsite and all portions thereof, save and except such parcels and tracts as have been dedicated for streets and alleys, and such parcels as have been sold to other parties, including the various parcels and rights of way conveyed by deed and grant to said

Alaska Central Railway Company, and, further this defendant admits that he refuses to acknowledge the claim of plaintiff to the ownership thereof, and refuses to convey any portion of said townsite to plaintiff, and alleges that no demand has been made therefor.

XI.

Answering paragraph XI of said complaint, this defendant denies that the Tanana Construction Company claims any interest in said lands and premises, and denies that said Tanana Construction Company has any right, claim or interest in or to said tract of land, or any part thereof, or at all; and, this defendant denies that he is an officer, director and trustee of both the defendants Tanana Construction Company and Alaska Central Railway Company, and further denies that the said Tanana Construction Company was and ever since the year 1904 has been a creature and a dummy of the said defendant Alaska Central Railway Company.

And for a further and separate defense this defendant says:

I.

That the complaint herein fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein; and, particularly, that on or about the 1st day of September, 1908, an action was commenced in the District Court for the Territory of Alaska, Third Division, at Valdez, Alaska, by the Trust & Guarantee Company, Limited, trustee of the bondholders of the Alaska Central Railway Company and others, and such proceedings were had therein

that all the assets of the Alaska Central Railway Company which were therein enumerated were sold and disposed of, and the lands described in plaintiff's complaint were not listed or claimed as a part of the assets of the said Alaska Central Railway Company, and were not a part of said assets, were not owned or claimed by said Railway Company, and said Railway Company had no interest therein.

And for a further and separate defense this defendant alleges:

I.

That the complaint herein fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein; and, particularly, that the cause of action stated in said complaint did not accrue within ten years before the commencement of said action, in that this defendant and the said Frank L. Ballaine have been, since the month of August, in the year 1904, in the actual, continuous, open, notorious, uninterrupted and adverse possession of said lands described in plaintiff's complaint, under claim and color of right and title; that said possession was adverse to all the world, and shortly thereafter this defendant and the said Frank L. Ballaine caused said tract of land to be surveyed into lots, blocks, streets and alleys, dedicating to the town of Seward, said streets and alleys for the uses and purposes in said dedication set forth, and have expended large sums of money in the survey and improvement of the same; and, further that said Alaska Central Railway Company during its existence had knowledge of such claim and color of right and of all the various acts

of ownership exercised by said Frank L. Ballaine and this defendant relative thereto.

That for a further and separate defense this defendant says:

I.

That the plaintiff, as successor in interest of the said Alaska Central Railway Company, is the owner of and in the actual possession of certain parcels of land embraced in the lands described in plaintiff's complaint, the same having heretofore been conveyed and granted by the defendant Frank L. Ballaine, as grantor, to the said Alaska Central Railway Company, as grantee, as follows, to wit:

- (a) By deed dated May 6, 1905, by Frank L. Ballaine, as Grantor, to the Alaska Central Railway Company, as Grantee, conveying a right of way for two railroad tracks upon, over and through a portion of the land embraced on U. S. Survey No. 726 South, duly witnessed and acknowledged and recorded in Book 1 of Deeds at pages 383 and 384 of the Cook Inlet Recording District, now designated as Kenai Recording District of the Third Division of the Territory of Alaska;
- (b) By instrument in writing granting an easement upon and over certain lands embraced in U. S. Survey No. 726 South, for a right of way for railroad tracks, dated May 6th, 1905, given by Frank L. Ballaine as party of the first part, to the Alaska Central Railway Company, a corporation, as party of the second part; duly witnessed and acknowl-

edged and recorded in Book 1 of Leases at pages 6 and 7 of the Records of said Cook Inlet Recording District, now designated as Kenai Precinct of said Third Division of the Territory of Alaska;

- (c) By Deed dated June 15, 1905, by Frank L. Ballaine and Genevieve Ballaine, his wife, as Grantors, to the Alaska Central Railway Company, a corporation, as Grantee, a certain tract of land containing seven and seven-tenths (7.7) acres embraced in U. S. Survey No. 726 South, duly witnessed and acknowledged, and recorded in Book 1 of Deeds, at pages 389, 390, 391 and 392 of the Records of said Cook Inlet Recording Precinct, now designated as Kenai Recording Precinct of the Third Division of the Territory of Alaska;
- (d) By Deed containing a full covenant of warranty, dated June 15, 1905, by Frank L. Ballaine and Genevieve Ballaine, his wife, as Grantors, to the Alaska Central Railway Company, a corporation, as Grantee, Lots 16, 17, 18, 19, and 20 in Block 16 of the Townsite of Seward, duly witnessed and acknowledged and recorded in Book 2 of Deeds at pages 25 and 26 of the Records of Cook Inlet Recording Precinct, now designated as Kenai Recording Precinct of the Third Division of the Territory of Alaska;

—and for a further and more specific and particular description of said several tracts of land and rights

of way, and of the covenants of warranty in said instruments contained, express reference is hereby made to the official record of said instruments as hereinbefore set forth.

II.

That since the date of the execution of said instruments of conveyance, the Alaska Central Railway Company as grantee of the defendant Frank L. Ballaine, and since on or about October 1st, 1909, the plaintiff herein as successor to the estate of the said Alaska Central Railway Company, have been, and the said plaintiff now is, in the exclusive possession and control of said parcels of land and rights of way, save and except, that under and by virtue of the terms of a certain contract in writing entered into on the 10th day of April, 1915, wherein the Honorable Franklin K. Lane, as Secretary of the Interior of the United States, acting by authority of the President of the United States, under an act of Congress of the United States entitled "An act to Authorize the President of the United States to Locate, Construct and Operate Railroads in Alaska and for Other Purposes," approved March 12, 1914, is named as vendee, and W. G. Stavert, F. G. Jemmett and W. J. Boland as a committee for the management of the Alaska Central Railway Syndicate, are named as vendors, said vendors have contracted to convey and sell to said vendee all the stocks and bonds of the Alaska Northern Railway Company, plaintiff herein, and all the assets of said plaintiff as set forth in the schedules annexed to said contract, and including in said assets the several tracts of land and rights of

way so acquired as aforesaid, from said defendant Frank L. Ballaine, it being, however, expressly stated in said contract that said sale is not intended to include the claim of plaintiff herein, or of its said committee so named as vendors in said contract, against any person or persons whomsoever with reference to the title to the Seward Townsite, otherwise known as United States Surveys 726 North and South; other than certain lands, which designated lands are the tracts and lands hereinbefore specifically designated in this answer; provided, however, that in said contract of sale and the said Franklin K. Lane, as the representative of the President of the United States, vendee therein, expressly stipulates that he or the Alaska Northern Railway Company shall be under no obligation to prosecute the claims of said committee, so named in said contract as vendors, or the claim of any person or persons whomsoever with reference to the title to said Seward Townsite; and this defendant avers the plaintiff herein Alaska Northern Railway Company, a corporation, is not the real party in interest in and to said litigation, but alleges the said W. G. Stavert, F. G. Jemmett and W. J. Boland, vendors as aforesaid, are the real parties in interest therein.

III.

That this defendant alleges that the plaintiff ought not to be admitted to say the defendant Frank L. Ballaine and this defendant hold the title to the lands described in plaintiff's complaint as trustees *ex maleficio* for and on behalf of plaintiff, for the reason that said plaintiff as successor to the estate of

the said Alaska Central Railway Company holds title to the several tracts and parcels of land, including rights of way, hereinbefore specifically described, as grantee of the said defendant Frank L. Ballaine by deeds containing full covenants of warranty, said tracts and parcels of land being a part of and included in the description of lands contained in plaintiff's complaint, and so as aforesaid contracted through said committee as vendors to be sold and conveyed to the Honorable Secretary of the Interior of the United States, as vendee.

WHEREFORE, this defendant having fully answered the complaint of plaintiff herein prays that the same may be dismissed, and that this defendant be awarded his costs and disbursements herein.

L. V. RAY,

Attorney for Defendant John E. Ballaine.

[Endorsed]: Plaintiff's Exhibit #2. #3122. Ballaine vs. Boland et al. Adm. Sept. 17. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By _____, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 3—Lis Pendens in Alaska
Northern Ry. Co. vs. Alaska Central Ry. Co., in
District Court for the Territory of Alaska, Third
Division.**

*In the District Court in and for the Territory of
Alaska, Third Judicial Division.*

No. 720.

ALASKA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY,
a Corporation, TANANA CONSTRUCTION
COMPANY, a Corporation, JOHN BAL-
LAINE, FRANK L. BALLAINE, FIRST
DOE, SECOND DOE, THIRD DOE,
FOURTH DOE, FIFTH DOE, SIXTH
DOE, SEVENTH DOE, EIGHTH DOE,
NINTH DOE, TENTH DOE, ELEVENTH
DOE, TWELFTH DOE, THIRTEENTH
DOE, FOURTEENTH DOE, FIFTEENTH
DOE, SIXTEENTH DOE, SEVEN-
TEENTH DOE, EIGHTEENTH DOE,
NINETEENTH DOE, TWENTIETH DOE,
TWENTY-FIRST DOE, TWENTY-SEC-
OND DOE, TWENTY-THIRD DOE,
TWENTY-FOURTH DOE, TWENTY-
FIFTH DOE, TWENTY-SIXTH DOE,

TWENTY-SEVENTH DOE, TWENTY-EIGHTH DOE, TWENTY-NINTH DOE, THIRTIETH DOE,

Defendants.

Notice is hereby given that a suit has been commenced in the above-named court by the above-named plaintiff against the above-named defendants, which suit is now pending. That the object of said suit is to obtain a decree of the above-entitled court ordering and directing said defendants and each of them to convey to plaintiff by good and sufficient deed the title to the lands and premises hereinafter described; also to adjudge and decree that the defendants and each of them now hold the title to said lands and premises in trust for said plaintiff; also that said defendants account to plaintiff for all moneys received and to be received for and on account of the sale of any part or portion of the lands and premises hereinafter described; also to obtain an injunction against said defendants and each of them restraining them and each of them from selling, disposing, or aliening the title to said lands and premises, or any part or portion thereof pending this suit.

The lands and premises so affected by this suit are described as follows, to wit: Being U. S. Survey No. 726 North, patented on the 20th day of May, 1905, by the United States Government to Frank L. Ballaine, described as follows:

Beginning at Corner Number One, being the Northeast corner of Survey Number 726 North, a granite stone monument marked "Cor. 1, S. 726 N.";

thence South along the East line of Survey No. 726 N., 24.83 chains to the Southeast corner of said Survey to Corner Number Two of said Survey, being a granite stone monument, marked "S. 726 N., Cor. 2"; thence West parallel with the North boundary of said Survey, 32.21 chains to the Southwest corner of said Survey, being Corner Number Three of said Survey, a granite stone monument marked "S. 726 N. Cor. 3"; thence North along the West line of said Survey 24.83 chains to Corner Number Four of said Survey, being the Northwest corner of said Survey and marked by a granite stone monument, marked "Cor. 4, S. 726 N."; thence East along the North line of said Survey 32.21 chains to place of beginning, containing 79.98 acres.

Also U. S. Survey Number 726 South, patented on May 1, 1905, by the United States Government to Frank L. Ballaine, described as follows: Beginning at Corner Number Two of Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the Northeast corner of said Survey No. 726 S.; thence South along the East side of said Survey No. 726 S., 17.17 chains to Corner Number Two, which is 2.67 chains South of witness corner to said Corner Number Two of said survey, which witness corner is a granite stone monument, marked "S. 726 S., Cor. 2, W. C."; thence from Corner Number Two of said Survey, following the meander line of said Survey, as follows: South 45 degrees West 3.10 chains; South 68 degrees 45 minutes West 4.30 chains; West 2.80 chains; South 66 degrees 30 minutes West 10.30

chains; South 60 degrees West 8.10 chains; South 55 degrees West 6.40 chains; South 17 degrees 15 minutes West 5 chains; to Corner number Three of said Survey, being 0.67 chains South of Witness corner to Corner Number Three of said Survey, which witness corner is in a granite stone monument, marked "S. 726 S., Cor. 3, W. C."; thence from said Corner Number Three of said Survey North along the West line of said Survey 37.50 chains to the Northwest corner of said survey, being Corner Number Three of Survey No. 726 N. and marked "S. 726 N., Cor. 3," and also marked "S. 726 S., Cor. 4"; thence East along the South line of said Survey No. 726 N., being the North line of said Survey No. 726 S., 32.21 chains to place of beginning, containing 79.97 acres.

Said premises comprising what is commonly known as the Townsite of Seward, Alaska.

The United States Patents for each of the two above described tracts of land are now of record in the office of the United States Commissioner and *ex-officio* Recorder, of the Kenai recording precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

Dated at Valdez, Alaska, this 29th day of April, 1915.

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Plaintiff.

The above instrument filed for record at 10 A. M. May 1st, 1915, by Donohue & Dimond.

M. J. CONROY,
District Recorder.

Territory of Alaska,
Third Division,
Kenai Recording District,—ss.

I, the undersigned United States Commissioner and *ex-officio* Recorder of the Kenai Recording District, Third Division, Territory of Alaska, do hereby certify that the foregoing is a full, true and correct copy of an original *Lis Pendens* as the same appears of record on pages 314–315 of Book 3 of Records, of records of said Recording District.

Witness my hand and my official seal affixed at Seward, Alaska, this 4th day of July, 1918.

[Seal] WM. H. WHITTLESEY,
U. S. Commissioner and Ex-officio Recorder.

[Endorsed]: Plaintiff's Exhibit #3. #3122. Ballaine vs. Boland et al. Adm. Sep. 17–18. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By _____, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

PLAINTIFF'S EXHIBIT 4 - SK

Resurrection

UNITED STATES C

FOR THE

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D.

F. D.

No.

ct for

PLAINTIFF'S EXHIBIT 4 - Sketch.

12.

3122

Plaintiff N. EX 4
Ballou vs Ballou

date - Sept 18

Corporate Limits

Seward 160

320

Poland tract

220

Reserve Tract

Resurrection Bay

F. M. Harshberger Clerk
By _____ Deputy

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
SEP 19 1918.

No. 3421
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC. 5. 1919
F. D. MONCKTON
Clerk

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